DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-10245
Vide 09-10246

Title	William Freeman, Petitioner v. United States
Docketed	April 16, 2010
Lower Ct.	United States Court of Appeals for the Sixth Circuit
Case Nos.	(09-5047)
Decision Date	November 20, 2009
Rehearing Denied	January 12, 2010
Questions Presented	

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 7 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 17, 2010)
Apr 7 2010	Appendix (Volume 1) of William Freeman filed.
May 4 2010	Order extending time to file response to petition to and including June 16, 2010.
Jun 16 2010	Brief of respondent United States in opposition filed. VIDED.
Jul 1 2010	DISTRIBUTED for Conference of September 27, 2010.
Jul 9 2010	Reply of petitioner William Freeman filed. (Distributed)
Sep 28 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 1 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 30, 2010.
Nov 30 2010	Joint appendix filed. (Statement of costs filed)
Nov 30 2010	Brief of petitioner William Freeman filed.
Nov 30 2010	Motion for leave to file a volume of the joint appendix under seal filed by petitioner William Freeman.
Dec 8 2010	Motion DISTRIBUTED for Conference of January 7, 2011.
Dec 21 2010	The time to file respondent's brief on the merits is extended to and including January 14, 2011.
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, February 23, 2011.
Jan 10 2011	Motion for leave to file a volume of the joint appendix under seal GRANTED.
Jan 10 2011	CIRCULATED.
Jan 14 2011	Brief of respondent United States filed. (Distributed)
Jan 20 2011	Record received from U.S.C.A. for Sixth Circuit. (1 binder)
Feb 14 2011	Reply of petitioner William Freeman filed. (Distributed)
Feb 23 2011	Argued. For petitioner: Frank W. Heft, Jr., Louisville, Ky. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
APR 07 2010
OFFICE OF THE CLERK

No. 09-10245

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

WILLIAM FREEMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTION PRESENTED

Section 3582(c)(2) of Title 18 of the United States Code provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the Government and the defendant may enter into a plea agreement in which they "agree that a specific sentence or sentencing range is the appropriate disposition of the case" and "such a recommendation or request binds the court once the court accepts the plea agreement."

The question presented is whether a defendant is ineligible for a sentence reduction under 18 U.S.C. §3582(c)(2) solely because the district court accepted a Rule 11(c)(1)(C) plea agreement.

Parties to the Proceeding

The only parties to this proceeding are those listed in the caption of the case.

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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

WILLIAM FREEMAN, **PETITIONER,**

vs.

UNITED STATES OF AMERICA, **RESPONDENT.**

PETITION FOR A WRIT OF CERTIORARI

The petitioner, William Freeman, respectfully petitions for a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

On December 31, 2008, the United States District Court for the Western District of Kentucky rendered an unpublished opinion and order denying petitioner a modification of his crack cocaine sentence pursuant to 18 U.S.C. §3582(c)(2). Volume (Vol.) I, Appendix (Apx.) C 1-3.

On November 20, 2009, the United States Court of Appeals for the Sixth Circuit rendered an unpublished opinion affirming the district court's order. Vol. I, Apx. B 1-16. See 2009 WL 4251050 (6th Cir. 11-20-10). Petitioner's petition for

rehearing *en banc* was denied on January 12, 2010. Vol. I, Apx. A1.

JURISDICTION

The Court of Appeals rendered its opinion on November 20, 2009, and denied the petition for rehearing *en banc* on January 12, 2010. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Pursuant to Sup. Ct. R. 13.1, this petition is filed within 90 days of January 12, 2010.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3582 provides in relevant part:

> (c) Modification of an imposed term of imprisonment - The court may not modify a term of imprisonment once it has been imposed except that--
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Fed.R.Crim.P. 11 provides in relevant part:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

STATEMENT OF THE CASE

1. On January 4, 2005, a superseding indictment charged petitioner, William Freeman, with possession of approximately 3.4 grams of cocaine base (crack) with intent to distribute in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(C) (Count 1); possession of approximately 1.6 grams of marijuana in violation of 21 U.S.C. §844 (Count 2); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 §924(c)(1)(A) (Count 3); and being a convicted felon in possession of a firearm in violation of 18 §922(g)(1) and §924(a)(2) (Count 4).

Petitioner and the government entered into a plea agreement pursuant

Fed.R.Crim.P. 11(c)(1)(C) (hereafter C plea) and he pleaded guilty to all counts of the superceding indictment. (Vol. I, Apx. G 2; Apx. F 1).Under the terms of the plea agreement, the Government would "agree that a sentence of 106 months is the appropriate disposition of this case;" recommend a fine at the lowest end of the applicable Guideline Range; recommend a 3 level reduction for "acceptance of responsibility" under United States Sentencing Guideline (USSG) §3E1.1(a) and (b); stipulate that the total quantity of drugs was 3.4 grams of crack and 1.6 grams of marijuana; and demand forfeiture of the firearm. (Vol. I, Apx. G 4-5).

Petitioner agreed that the disposition was "fair" and he would "not oppose imposition of a sentence incorporating the disposition provided for within [the] Agreement, nor argue for any other sentence." (Vol. I, Apx. G 8). He also agreed "to have his sentence determined pursuant to the Sentencing Guidelines." (*Id.* Apx. G 5).

The parties calculated a base offense level of 22 minus 3 levels for acceptance of responsibility (USSG §§3E1.1(a) and (b)) for an adjusted offense level of 19. (Vol. I, Apx. G 5). The plea agreement noted that the firearm charge (18 U.S.C. §924(c) - Count 3) carried a term of 60 months imprisonment that would run consecutively with any sentence imposed on the drug charges. *Id.* The parties anticipated a criminal history of IV but agreed it would be determined upon completion of the Presentence Investigation Report (PSR). *Id.* They reserved: 1) the

right to object to the calculation of criminal history and, 2) the right to seek a departure from the criminal history category. *Id.* The parties also agreed that the aforementioned sections of the Guidelines were not binding on the district court which would independently calculate the Guidelines. *Id.*

The PSR calculated a total offense level of 19 on the crack charge (Count 1) (base offense level of 22 minus 3 levels for acceptance of responsibility). (Vol. II (sealed), Apx. I, 4-5). The criminal history category was IV. (*Id.* Apx. I, 6-7). Thus, the Guidelines Range was 46-57 months consecutive to the 60 months mandatory minimum sentence on the firearm charge (Count 3). (*Id.* Apx. I, 8).

At sentencing on July 18, 2005, the district court imposed the 106 month sentence which the parties agreed was the "appropriate disposition of the case." Fed.R.Crim.P. 11(c)(1)(C). (Vol. I, Apx. E 3). The court imposed concurrent sentences of 46 months on Counts 1 and 4 and a concurrent sentence of 12 months on Count 2. *Id.* Those sentences were run consecutive to the mandatory minimum sentence of 60 months on the §924(c) firearm charge (Count 3). *Id.* The court also imposed a 3 year term of supervised release. (Vol. I, Apx. E 4).

2. In light of the retroactive effect of USSG Amendment 706 which reduced the offense level for crack offenses by two levels, the district court on June 5, 2008, pursuant to 18 U.S.C. §3852, appointed counsel for petitioner and ordered the United

States Probation Office to file a Memorandum of Recalculation (MOR) under seal. (Vol. I, Apx. D 1-2).

The original MOR noted that the parties entered into a Rule 11(c)(1)(C) plea agreement and agreed on a sentence of 106 months which was imposed by the district court. The total offense level was 19 (adjusted offense level of 22 minus a 3 level adjustment for acceptance of responsibility) which yielded a Guidelines Range of 46-57 months when a criminal history category of IV was applied. (Vol. II (sealed), Apx. K 2-3). Under Amendment 706, the combined adjusted offense level was 20. With a 3 level adjustment for acceptance of responsibility, the total offense level was reduced to 17 which yielded a Guidelines Range of 37-46 months when a criminal history category of IV was applied. *Id.* The Probation Office recommended the entry of "an amended judgment for a reduced sentence of 37 months ... on Counts 1 and 4, to be served concurrently with the 12 months on Count 2, but consecutively with the 60-month sentence imposed on Count 3 for a total amended term of imprisonment of 97 months (original sentence 106 months)." (*Id.* Apx. K 3).

The Probation Office subsequently filed an Amended MOR in which it reiterated the previous Guidelines' calculations but now determined that petitioner was ineligible for a crack sentence reduction "since the original sentence was imposed under the terms of a binding Rule 11(c)(1)(C) agreement, no further

reduction is authorized." (Vol. II (sealed), Apx. H 2-3).

Defense counsel objected to the Amended MOR on the ground that Rule 11(c)(1)(C) did not preclude petitioner from receiving the two level reduction in his crack sentence authorized by Amendment 706. (Vol. II (sealed), Apx. I 4-6). Counsel argued that while the parties agreed to the specific sentence that was imposed, they used the applicable Guidelines to determine that sentence and the district court likewise relied on those Guidelines to determine whether to accept the Rule 11(c)(1)(C) plea agreement. *Id.* Counsel further argued that *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004) *cert.* denied 542 U.S. 911 (2004) rested on the "dubious assertion" that the defendant's sentence was not calculated under the Guidelines but was determined by the Rule 11(c)(1)(C) plea agreement. (*Id.* Apx. J 6).

In response, the Government argued that the district court did not have the authority under *Peveler* to modify petitioner's crack sentence because he entered a Rule 11(c)(1)(C) plea agreement. (Vol. II (sealed), Apx. J1-2).

The district court citing *Peveler, supra*, ruled that petitioner's crack sentence "was not based upon a guidelines calculation" but was instead "agreed upon by the parties pursuant to Rule 11(c)(1)(C)." (Vol. I, Apx. C 3). Although it was "not completely persuaded" by *Peveler*, the district court found that it was "the prevailing law in the Sixth Circuit" and thus Amendment 706 had no effect on petitioner's

sentence. *Id.* The district court ruled that the entry of a guilty plea under Rule11(c)(1)(C) rendered petitioner ineligible for a sentence reduction under 18 U.S.C. §3582(c)(2) and Amendment 706. *Id.*

3.The Sixth Circuit affirmed the district court's denial of a §3582(c)(2) reduction of petitioner's crack sentence because its "holding in *Peveler* precludes resentencing in [his] case." (Vol. I, Apx. B3). See 2009 WL 4251050, p.2 (6th Cir. 11-20-10).[1] The Sixth Circuit explained, "In *Peveler*, we held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement. 359 F.3d at 379."(Vol. I, Apx. B3; 2009 WL 4251050, at p.2. However, an exception exists where "resentencing is necessary to avoid a miscarriage of justice." (Vol. I, Apx. B 4 citing *Peveler*, 359 F.3d at 379 n. 4). But the court said that petitioner did not fall within that exception. *Id.*

The Sixth Circuit noted that petitioner's original Guidelines Range on his crack sentence was 46-57 months which had to run consecutively with a 60 month sentence on the firearm charge for a total range of 106 - 117 months. (Vol. I, Apx. B 5). As a result of Amendment 706, the amended Guidelines Range was 37-46 months which

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[1] The Sixth Circuit consolidated petitioner's case with United States v. Antonio Goins (6th Cir. No. 08-6374) which presented the same issue on appeal. (Vol. I, Apx. B1). See 2009 WL 4251050, p.1 (6th Cir. 11-20-10).

also had to consecutively with aforementioned 60 month sentence for a total range of 97-106 months. *Id.* In the court's view, petitioner's 106 month sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment, a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing." *Id.* citing *Peveler*, 359 F.3d at 379, n.4.

In a separate opinion, Judge White agreed that "affirmance is mandated" by *Peveler* but in her view, "*Peveler* construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended." (Vol. I, Apx. B 6). See 2009 WL 4251050, p.3 (6th Cir. 11-20-10) (White, J., concurring). Judge White observed, "The *Peveler* court concluded that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement is based on the agreement, not the Guidelines, and thus is not encompassed by the statute. This is an overly narrow interpretation of the statute." (Vol. I, Apx. B 9-10). As she explained, "Nothing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements." *Id.* at Apx. B 10. "Given that Rule 11(c)(1)(C) sentences are negotiated in the context of the same Guidelines as non-negotiated sentences, and are affected by the same Guidelines later rejected and amended by the Commission," Judge White concluded that "there is no reason to

believe Congress intended to single these sentences out and deny § 3582(c)(2) relief to defendants who pleaded guilty pursuant to Rule 11(c)(1)(C) agreements." *Id.* at Apx. B 10. "Were it not for *Peveler*," Judge White would have remanded petitioner's case "with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate." *Id.* at Apx. B 16.

REASONS FOR GRANTING THE PETITION

The United States Sentencing Commission recognized that crack cocaine sentences were unduly harsh and issued Amendment 706 to the Sentencing Guidelines which essentially reduced crack sentences by two offense levels. As a result of the retroactive effect of Amendment 706, defendants convicted of crack offenses were able to seek a sentence reduction pursuant to 18 U.S.C. §3582(c)(2).

The Court should grant this petition to resolve an important question on which there is a split of authority among the courts of appeals - whether a district court is precluded from reducing a sentence under 18 U.S.C. §3582(c)(2) solely because the defendant has entered a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(C).

Given the number of cases that are resolved by guilty pleas, the issue presented is particularly important because it affects the day-to-day administration of justice in federal courts. As shown below, the Sixth Circuit's decision in *United States v.*

Peveler, supra, is analytically flawed and conflicts with this Court's guilty plea jurisprudence. Furthermore, *Peveler's* holding has no support in the language of Rule 11(c)(1)(C) or §3582(c)(2) and its flawed reasoning must be addressed by this Court because it is not limited to Rule 11(c)(1)(C) plea agreements but can easily be extended to all guilty pleas whether they are entered under Rule 11(c)(1)(A), (B), or (C). *Peveler* also construes 18 U.S.C. §3582(c)(2) more narrowly than Congress intended and thereby frustrates not only the underlying purpose of the statute but also the Sentencing Commission's efforts to remedy unfair and unduly harsh Guidelines.

1. *Peveler* incorrectly focuses on the absence of an agreement concerning the application of 18 U.S.C. §3582(c)(2).

Insofar as the Sixth Circuit relied on its precedent in *Peveler* to resolve the issue presented in petitioner's' case, this petition will address the rationale underlying *Peveler*.

In *Peveler*, 359 F.3d at 370, the defendant entered a plea agreement, pursuant to Rule 11(c)(1)(C) (the predecessor to the current Rule11(c)(1)(C)), and pleaded guilty to drug offenses and carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. §924(c). The plea agreement "expressly provided" that sentencing would be at an offense level of 30 and the Government would "recommend a sentence of imprisonment at the low end of the

applicable Guideline range but not less than any mandatory minimum ..." *Id.* at 372-373. Peveler was sentenced in conformance with the plea agreement. *Id.* at 373.

Peveler subsequently filed a §3582(c)(2) motion to reduce his firearms sentence in light of the retroactive application of USSG Amendment 599. *Peveler*, 359 F.3d at 370-371. The "threshold issue" was "whether the district court possessed the authority to modify [the] parties' agreed sentence that was imposed under a Rule 11(e)(1)(C) plea agreement." *Id.* at 375. The Sixth Circuit ruled that:

> absent an agreement of the parties, the plain language of the current version of Rule 11(e)(1)(C), now Rule 11(c)(1)(C), generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. §3582(C). This conclusion applies despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence.

Peveler, 359 F.3d at 379.

That conclusion is flawed because it incorrectly focuses on the absence of an agreement concerning the application of §3582(c)(2). Instead, the focus should be on the absence of any waiver regarding the application of §3582(c)(2). Petitioner's plea agreement is silent as to the future applicability of §3582(c)(2) and in the absence of an explicit waiver of the right to be considered for §3582(c)(2) relief, a waiver cannot be presumed, implied, or read into the plea agreement. To do so would undermine the validity of the guilty plea which requires a knowing and voluntary waiver of rights.

Boykin v. Alabama, 395 U.S. 238 (1969); see also *Brady v. United States*, 397 U.S. 742, 748 (1970).

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and courts "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Olano*, 507 U.S. 725, 733 (1993). That standard is not met because petitioner's plea agreement does not addresses the future application of §3582(c)(2) and the parties did not agree that he was ineligible for §3582(c)(2) relief if the Sentencing Commission amended and retroactively applied a relevant Guideline. While petitioner and the government may have agreed to a particular sentence, they "did not agree that the stipulated sentence would be immutable for all time, regardless of what might happen in the future." *United States v. Dews*, 551 F.3d 204, 209 (4th Cir. 2008) (rehearing dismissed as moot). For the Sixth Circuit to construe the plea agreement as an implicit waiver of a §3582(c)(2) resentencing raises doubt about the validity of the guilty plea. *Boykin v. Alabama* and *Brady v. United States*, both *supra*.

In *Dews, supra*, the Fourth Circuit considered the issue presented by petitioner's case - whether a defendant who enters a C plea under is ineligible for a §3582(c)(2) sentence reduction. In declining to follow *Peveler*, the Fourth Circuit

concluded that a guilty plea based on Rule 11(c)(1)(C) is subject to §3582(c)(2)and "it does not follow" from the binding nature of a C plea agreement that

> the district court lacks authority to alter that sentence under §3582(c)(2), provided the requirements of that provision are met. To be sure, a district court is bound by the parties' bargain, but here the parties' bargains might have, but did not, address the future application of §3582(c)(2). In this circumstance, there is no reason in principle or in the language of Rule 11(e)(1)(C) that precludes a future application of §3582(c)(2) in an appropriate case. Put another way, appellants here agreed to plead guilty if the district court would sentence them to a guidelines term of imprisonment of 168 months, and the district court did so. They did not agree that they would not seek relief under §3582(c)(2) in the event the Sentencing Commission retroactively amended a relevant guideline. The district court is accordingly free to consider their motions and to grant them if the district court finds it appropriate to do so in light of the relevant guideline amendment and the factors set forth in 18 U.S.C. §3553(a).

United States v. Dews, 551 F.3d at 211. The Fourth Circuit's reasoning holds true in petitioner's case. There is no language in the plea agreement to suggest that the parties intended that petitioner waive his right to seek a sentence reduction under §3582(c)(2). And if the plea agreement is deemed ambiguous by the absence of an explicit waiver of §3582 rights, then the ambiguity must be construed against the Government.[2]

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[2] See *United States v. McIntosh*, 484 F.3d 832, 836 (6th Cir. 2007) citing *United States v. Randolph*, 230 F.3d 243, 248 (6th Cir. 2000) (ambiguities in a plea agreement must be construed against the Government).

Insofar as *Peveler* focuses on the absence of an agreement concerning the future application of §3582(c)(2) rather than an explicit waiver of the statute's applicability, it is in conflict with fundamental principles of this Court's guilty plea jurisprudence.

2. *Peveler's* rationale is not supported by the plain language of 18 U.S.C. §3582(c)(2) and Fed.R.Crim.P. 11(c)(1)(C).

The parties' agreement under Fed.R.Crim.P. 11(c)(1)(C) "that a specific sentence or sentencing range is the appropriate disposition of a case ..." should not make any difference whether a defendant is entitled to a §3582(c)(2) sentence reduction. A sentence negotiated under Rule 11(c)(1)(C), like any another negotiated or non-negotiated sentence, is necessarily affected by the Guidelines and there is no reason to believe that Congress intended to deny §3582(c)(2) relief to a defendant who enters a C plea because there is no language in Rule 11(c)(1)(C), 18 U.S.C. §3582(c)(2), or the Guidelines to support such a conclusion. This viewpoint is supported by decisions of the Fourth and Tenth Circuits.

Peveler's, 359 F.3d at 377-378, reasoning that a sentence imposed under a binding Rule 11(c)(1)(C) plea agreement is not "based on a sentencing range that has been subsequently lowered by the Sentencing Commission"[18 U.S.C. §3582(c)(2)] is flawed because

> it lacks grounding in the text of either §3582(c)(2) or Rule 11(e)(1)(C). The language of §3582(c)(2) is plain: a court may reduce the term of imprisonment 'in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered.' The statute does not state that a sentence imposed consistent with a plea agreement cannot be 'based on a sentencing range, nor does it state that the sentencing range must be the sole basis of the sentence. To conclude otherwise would require adding words to the statute, a task in the province of the legislature and not the judiciary. Similarly, nothing in Rule 11(e) compels the *per se* rule advocated by the dissent. Under the terms of the rule, a district judge who accepts a Rule 11(e)(1)(C) plea agreement must 'embody in the judgment and sentence the disposition provided for in the plea agreement.' Rule 11(e)(3), Fed.R.Civ.P. (1998). It does not follow, however, that such a sentence cannot also be based on a sentencing range, which these sentences clearly were. Where, as here, the district judge clearly accepted the plea agreements only after determining that the stipulated sentences were within the applicable guidelines range, the sentences imposed were both guidelines-based-and hence eligible for §3582(c)(2) treatment-and agreed to under Rule 11(e)(1)(C).

United States v. Dews, 551F.3d at 211-212.

The Fourth Circuit further observed that there is no language in Rule 11(e)(1)(C) to suggest that a guilty plea entered pursuant to that rule is exempt from the scope of §3582(c)(2).

> Nothing in that rule precludes a defendant pleading guilty under that rule from receiving the benefit of a later favorable retroactive amendment to the guidelines, provided, of course, that the requirements of §3582(c)(2) are met. Neither the language nor the purpose of the rule addresses or precludes the later application of §3582(c)(2) in appropriate circumstances. Put differently, a sentence may be both a guidelines - based sentence eligible for treatment under §3582(c)(2) and a sentence stipulated to by the parties in a plea agreement pursuant to Rule 11(e)(1)(C). The parties in this case stipulated to a guidelines-based

> sentence in light of the circumstances that then existed; they did not agree that the stipulated sentence would be immutable for all time, regardless of what might happen in the future. Just as a stipulated sentence under Rule 11(e)(1)(C) might be later altered by way of a Rule 35 motion, a pardon, or a commutation, so, too, can a guidelines-based stipulated sentence be altered in the future pursuant to §3582(c)(2), provided the requirements of that statute are met. In sum, then, we conclude that the district judge erred in concluding that she lacked authority to grant appellants' motions for reduction in sentence pursuant to §3582(c)(2).

United States v. Dews, 551 F.3d at 209. Thus, *Dews* makes it clear that the plain language of §3582(c)(2) and Rule 11(c)(1)(C) present no obstacle to a sentence reduction based on Guidelines Amendment 706 for a defendant who enters a C plea.

The Tenth Circuit expressed its agreement with *Dews* in *United States v. Cobb*, 584 F.3d 979, 982 (10th Cir. 2009) petition for rehearing *en banc* granted on February 17, 2010. See 2010 WL 546057 (10th Cir. 2010).[3] In *Cobb*, 584 F.3d at 981, the defendant pleaded guilty under Rule 11(c)(1)(C) (the predecessor to Rule 11(c)(1)(C)) and subsequently filed a §3582(c)(2) motion for a crack sentence reduction based on Amendment 706. *Id.* The district judge denied the motion on the ground that he lacked authority to reduce the sentence because it was not based on a

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[3] Pursuant to 10th Cir. R. 35.6 which is entitled "Effect of rehearing *en banc*," "The grant of rehearing *en banc* vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so order." In *Cobb*, the order granting rehearing *en banc* does not indicate that the panel decision was vacated. See 2010 WL 546057 (10th Cir. 2-17-10).

Guideline range. *Id.* at 982. The Tenth Circuit reversed and concluded that where a defendant has entered a Rule 11 guilty plea, the district court has authority under §3582(c)(2) to reduce the sentence where it is "based at least in part on the then - applicable sentencing range." *Id.* at 985.

The Tenth Circuit in *Cobb*, 584 F.3d at 984 agreed with the Fourth Circuit's holding in *Dews*, 551 F.3d at 211, that "it does not follow" from the binding nature of a Rule 11(c)(1)(C) plea agreement that "the district court lacks authority to alter that sentence under §3582(c)(2), provided the requirements of that provision are met." See also *United States v. Coleman*, 594 F.Supp.2d 164 (D. Mass. 2009) (following *Dews*), *United States v. Pichon*, 2009 WL 1076709 (E.D. La. 2009) (unpublished) (declining to follow *Peveler*) and *Melendez-Perez v. United States*, 467 F.Supp.2d 169, 175-176 (D. Puerto Rico 2006) (binding plea agreement under former Rule 11(e)(1)(C) did not foreclose application of a subsequent Guideline amendment where the court was "convinced that it would have assuredly rejected the plea agreement at sentencing if it had been aware" of the amendment).

In *Cobb*, the Tenth Circuit observed that the key to the Fourth Circuit's ruling in *Dews* was "the concept that 'a sentence may be **both** a guidelines-based sentence eligible for treatment under §3582(c)(2) and a sentence stipulated to by the parties in a plea agreement pursuant to Rule 11(c)(1)(C).' *Dews*, 551 F.3d at 209." *Cobb*, 584

F.3d at 984 (emphasis original). The Tenth Circuit, like the Fourth Circuit, found that "nothing in the language of §3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefitting from a favorable retroactive guideline amendment." *Cobb*, 584 F.3d at 984.

Recognizing the reality of plea bargaining in federal courts and its interplay with the Guidelines, the Tenth Circuit said in *Cobb*, 584 F.3d at 985, that §3582(c)(2) "generally allows for reductions of sentences which are based in any way on a qualifying range." Petitioner meets that criteria because the MOR clearly shows that his crack Guideline range was lowered from 19 to 17 as a result of Amendment 706. (Vol. II (sealed), Apx. II 2-3). As *Gall v. United States*, 552 U.S. 38, 49 (2007) states, "the Guidelines should be the starting point and the initial benchmark" for determining a defendant's sentence. The Guidelines figured prominently in petitioner's plea agreement culminating with the proviso that he "agrees to have his sentence determined pursuant to the Sentencing Guidelines." (Vol. I, Apx. G 5). Moreover, §6B1.2(c) of the Guidelines instructs the court to consider the Guideline Range in determining whether to accept a C plea.[4] The Guidelines were clearly the

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[4] USSG, §6B1.2(c) provides: "In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set

foundation of the plea agreement and Paragraphs 10-12 thereof leave no doubt that the "appropriate disposition of this case" (106 months) was based on the parties' Guidelines calculation. (Vol. I, Apx. G 5).[5] Thus, the agreed sentence stemmed directly from the Guidelines and for purposes of §3582(c)(2) petitioner was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission ..." If the amended range were in effect when petitioner was originally sentenced, the parties and the district court would undoubtedly have used that Guideline in determining a sentence that was an "appropriate disposition of the case." Fed.R.Crim.P. 11(c)(1)(C).

Certiorari should be granted because *Peveler* misconstrues Rule 11 and §3582(c)(2) by reading them to prohibit a §3582(c)(2) sentence reduction solely because a defendant enters a C plea.

3. There is a split of authority on the Question Presented by this case.

As shown above, the Fourth Circuit in *United States v. Dews*, *supra*, and the

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forth in writing in the statement of reasons or judgment and commitment order."

[5] The agreed disposition of 106 months was calculated from the adjusted offense level (19) and the criminal history category (IV) which yielded a Guidelines Range of 46-57 months. The parties agreed on a sentence at the low end of the Guidelines (46 months) to run consecutively with the 60 month mandatory minimum on the §924(c) firearm charge. (Vol. I, Apx. G 5; Vol. II (sealed), Apx. H 2-3).

Tenth Circuit in *United States v. Cobb, supra*, have ruled that a defendant who enters a C plea is not thereby rendered ineligible for a §3582(c)(2) sentence reduction. See also *United States v. Coleman*, 594 F.Supp.2d 164 (D. Mass. 2009) (following *Dews*). The Sixth Circuit reached the opposite conclusion in *United States v. Peveler, supra*. Other courts have also ruled on the issue.

In *United States v. Scurlark*, 560 F.3d 839, 841 (8th Cir. 2009) *cert.* denied ___ U.S. ___, 130 S.Ct. 738 (2009), the Eighth Circuit held that "§3582(c)(2) became inapplicable" to a defendant who entered a C plea "because [his] sentence was based on the agreement and not "a sentencing range that [has] subsequently been lowered by the Sentencing Commission." The Second Circuit has reached a similar conclusion by "reasoning that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement 'arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea.'" *United States v. Main*, 579 F.3d 200, 203 (2nd Cir. 2009) *cert.* denied ___ U.S. ___, 130 S.Ct. 1106 (2009) quoting *United States v. Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) *cert.* denied 546 U.S. 1097 (2006).[6]

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[6] An additional problem raised by the rationale underlying *Peveler*, *Scurlark*, and *Main* is that it can be extended to cases in which the defendant enters a guilty plea under Rule 11(c)(1)(A), (B), or (C). If it is the "agreement" that is the key factor in determining eligibility for a §3582(c)(2) sentence reduction, then it is inconsequential whether a guilty plea is entered under Rule

The Third Circuit has taken a somewhat different path to reach its conclusion in *United States v. Sanchez*, 562 F.3d 275, 279 (3rd Cir. 2009) *cert.* denied ___ U.S. ___, 130 S.Ct. 1053 (2010) that the defendant's crack "sentence was the result of a binding plea agreement and is therefore not subject to reduction under 18 U.S.C. §3582(c)(2)." The Third Circuit rejected the *per se* approach taken in *Peveler* and *Scurlark* and opted for an approach anchored on the specific circumstances of a given case. As the Third Circuit saw it, "The question is what is the sentence based on, and the answer depends on what happened in court." *Id.* at 282. For purposes of §3582(c)(2), the court said that a "sentence is 'based on' whatever the District Court considered in imposing it..." *Id.* at 282, n.8. If the district court considered the Guidelines in accepting the plea then it could modify the sentence under §3582(c)(2). If it did not consider the Guidelines, then it would not have the power to modify the sentence.

Thus, it can be seen that the courts of appeals have taken three different approaches to resolving the Question Presented by petitioner's case. Such a split of authority requires the guidance of this Court to ensure fair and consistent results. A defendant's eligibility for a §3582(c)(2) sentence reduction should not hinge on the

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11(c)(1)(A), (B), or (C) because the parties have agreed to a particular sentence or sentence range even if their agreement does not bind the court.

circuit in which he or she is sentenced.

4. *Peveler's* rationale defeats efforts to remedy the sentencing disparity between crack and powder cocaine.

Amendment 706 to the Guidelines reflects the Sentencing Commission's concern that sentences for crack offenses are too harsh and that there is a need to remedy the disparity between crack and powder cocaine sentences. In *Spears v. United States*, 555 U.S. ___, 129 S.Ct. 840, 172 L.Ed.2d 596 (2009), the Court held that *Kimbrough v. United States*, 552 U.S. 85 (2007) allows a sentencing court in a crack case to "reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." *Spears*, 129 S.Ct. at 843-844. See *Kimbrough*, 552 U.S. at 100 (other citation omitted) (describing the two level crack cocaine Guideline amendment as a "modest" amendment, and noting that the Commission itself described it as "'only ... a partial remedy' to the problems generated by the crack/powder disparity")

Kimbrough, *Spears*, and Amendment 706 reflect a consensus that crack sentences were unnecessarily harsh and that remedial steps were necessary to reduce the disparity between crack and powder cocaine sentences. *Peveler's* holding that a defendant can be denied a §3582(c)(2) sentence reduction merely because he entered a C plea erects an arbitrary barrier to providing a remedy for a sentence range that has been found to be unjust. Moreover, *Peveler* myopically focuses on the "binding"

nature of a Rule 11(c)(1)(C) plea agreement rather than the intent underlying §3852(c)(2). *Peveler's* reasoning is even more strained in light of current Justice Department policy to eliminate the disparity between crack and powder cocaine sentences and efforts by the courts to do likewise. See e.g., *United States v. Lewis*, 623 F.Supp.2d 42, 47 (D.D.C. 2009) in which the court, relying on *Kimbrough* and *Spears*, announced its intention to "apply [a] 1- to - 1 crack to powder ratio in all crack cases and then will separately consider all aggravating factors applicable in any individual case ..." [7] See also *United States v. Gully*, 619 F.Supp.2d 633, 642 (N.D. Iowa 2009) ("this court believes that the appropriate course is to treat interchangeable forms of cocaine as equivalents, and to enhance punishment when additional criminal effects and use of weapons, for example, are present in a particular case."); *United States v. Medina*, 2009 WL 2948325, p. 3 (S.D. Cal. 2009) (finding *Gully* "persuasive" and collecting other cases adopting the 1-to-1 ratio).

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[7] The Department of Justice now takes the position that there should be no disparity between crack and powder cocaine sentences. See, Statement of Lanny A. Breuer, Assistant Attorney General, on April 29, 2009, before United States Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf; see also Memorandum of May 1, 2009, to all federal prosecutors from David W. Ogden, Deputy Attorney General, re Department Policies and Procedures Concerning Sentencing for Crack Cocaine Offenses, p.1 ("The President and Attorney General believe Congress should eliminate the sentencing disparity between crack cocaine and powder cocaine.") (http://www.fd.org/pdf_lib/DOJ%20crack%20memo.pdf).

Peveler is contrary to current efforts to eliminate the disparity between crack and powder cocaine sentences. It does so without offering any better reason than petitioner entered a binding plea agreement for a specific sentence notwithstanding the fact that the Guidelines for his crack sentence have been reduced. *Certiorari* should be granted because *Peveler* conflicts with the direction taken by the Court in *Kimbrough* and *Spears*.

5. *Peveler's* rationale has adverse, long-term, implications for the federal criminal justice system.

As shown above, *Peveler* held that a defendant who enters a Rule 11(c)(1)(C) plea is categorically ineligible for a §3582(c)(2) sentence reduction and its rationale can easily be extended to cases in which the defendant enters a guilty plea under Fed.R.Crim.P. 11(c)(1)(A) or (B). Thus, *Peveler* has an enormous impact on the administration of justice in federal courts across the country. The entry of a guilty plea "has a central role in the criminal process"[8] and *Peveler's* rationale on which petitioner's case was decided will have undeniably adverse effect on the entry of guilty pleas because when the defendant "agrees" to a sentence he or she is at least by implication waiving his or her right to a §3582(c)(2) sentence reduction if a relevant Guideline is amended and applied retroactively.

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[8] *United States v. Cox*, 464 F.2d 937, 943 (6th Cir. 1972) citing *Brady v. United States*, 397 U.S. at 752 n. 10.

Statistical data confirms the importance of guilty pleas to the criminal justice system. In Fiscal Year 2008, 96.3% of federal cases were resolved by guilty pleas. See Table 10, p. 23, United States Sentencing Commission, 2008 Sourcebook of Federal Sentencing Statistics. Those statistics reflect the plea bargaining process is "as an essential and desirable practice in the administration of criminal justice." *United States v. Barnes*, 278 F.3d 644, 649 (6th Cir. 2002) citing *Santobello v. New York*, 404 U.S. 257, 262 (1971). Plea bargaining is therefore "to be encouraged." *Chaffin v. Stynchcombe*, 412 U.S. 17, 31, n.18 (1973) (other citations omitted). See also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). Adherence to *Peveler* does not encourage plea bargaining and therefore does not serve the interests or administration of justice. As the Tenth Circuit explained in *Cobb*, 584 F.3d at 985,

> Barring defendants who enter Rule 11 pleas from pursuing sentence modifications under §3582 tends to undermine this general pattern and ignore the pervasiveness of pleas. It also undervalues the role of the guidelines in determining the negotiable range in plea agreements. It is simply unrealistic to think that the applicable guideline range is not a major factor (if not the major factor) in reaching a stipulated sentence. If we categorically removed Rule 11 pleas from the reach of §3582, it would perpetuate the very disparity §3582 and the retroactive application of Amendment 706 were meant to correct. Such an approach would leave defendants who pled guilty before the effective date of the amendment with higher sentences than those who pled guilty afterward because the post-amendment pleas and plea negotiations are based on

> the lower, modified sentencing ranges. Therefore, all defendants who entered Rule 11 pleas before the effective date of the amendment would be left serving greater sentences on the now-rejected grounds of the 100-to-1 powder-to-crack cocaine ratio.

Peveler and cases like *Scurlark* that conclude that a defendant who enters a plea agreement under Fed.R.Crim.P. 11(c)(1)(C) is ineligible for a §3582(c)(2) sentence reduction frustrate the remedial intent underlying the statute and amendments to relevant Guidelines that are intended to address unfair or unduly harsh sentences. *Peveler* and *Scurlark* conflict with the plain language of §3582(c)(2) which only requires that the defendant be sentenced to a term of imprisonment that is "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." As shown above, Amendment 706 lowered the sentencing range for petitioner's crack offense. (Vol. II (sealed), Apx. H 2-3; Apx. K 2-3).

Even if a Rule 11(c)(1)(C) plea agreement is binding on the parties and the district court, it should not preclude a §3852(c)(2) sentencing reduction. Otherwise, it would frustrate the intent underlying the statute which is predicated on the recognition that a sentence which at one time was thought to be fair has been proven over time to be unduly harsh. Consequently, Congress's intent underlying §3852(c)(2) is subverted by *Peveler's* holding that a Rule 11(c)(1)(C) plea agreement forever binds the parties regardless of the circumstances that trigger a §3852(c)(2) resentencing. *Id.* 359 F.3d at 379.

Certiorari should be granted to ensure that the remedial efforts of Congress and the Sentencing Commission with respect to Guidelines Amendments are fully implemented by federal courts.

CONCLUSION

For the foregoing reasons, the petitioner, William Freeman, by counsel, respectfully submits that the Court should grant his petition for a writ of *certiorari*.

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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

WILLIAM FREEMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PROOF OF SERVICE

I, Frank W. Heft, Jr., a member of the Bar of this Court, state that on April 7, 2010, as required by Supreme Court Rule 29, I have served a copy of the enclosed Petition for Writ of Certiorari, Volume I and Volume II (sealed) of the Appendix to the Petition for Writ of Certiorari, and Motion for Leave to Proceed in *Forma Pauperis* by depositing them with the United States Postal Service, with first class postage prepaid, properly addressed to:

Honorable Elena Kagan
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

All parties required to be served have been served.

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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2009

WILLIAM FREEMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX - VOLUME I
TO PETITION FOR A WRIT OF CERTIORARI

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OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
JUN 16 2010
OFFICE OF THE CLERK

Nos. 09-10245 and 09-10246

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ANTONIO COINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 09-10245

WILLIAM FREEMAN, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B16) is not published in the Federal Reporter, but is available at 355 Fed. Appx. 1.[1] The opinions of the district court (Pet. App. C1-C3; 09-10246 Pet. App. C1-C2) are not reported.

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[1] Unless otherwise indicated, citations to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 09-10245.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2009. Petitions for rehearing were denied on January 12, 2010 (Pet. App. A1). The petitions for a writ of certiorari were filed on April 7, 2010 (No. 09-10245) and April 9, 2010 (No. 09-10246). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the Western District of Kentucky, petitioner William Freeman was convicted of possessing with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1), (b)(1)(C); possessing marijuana, in violation of 21 U.S.C. 844; possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and being a felon in possession of a firearm, 18 U.S.C. 922(g)(1), 924(a)(2). Pursuant to a Rule 11(c)(1)(C) plea agreement, he was sentenced to 106 months of imprisonment, to be followed by five years of supervised release.

Following a guilty plea in the Western District of Kentucky, petitioner Antonio Goins was convicted of two counts of possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C); possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B)(iii); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C.

924(c)(1)(A). Pursuant to a Rule 11(c)(1)(C) plea agreement, he was sentenced to 168 months of imprisonment, to be followed by four years of supervised release.

Each petitioner filed a motion to reduce his sentence pursuant to 18 U.S.C. 3582(c)(2). The district court in each case denied the motion, and the court of appeals affirmed those decisions in a consolidated opinion. Pet. App. B1-B16.

1. a. On January 4, 2005, a federal grand jury returned a superseding indictment charging Freeman with possessing with intent to distribute approximately 3.42 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C) (Count 1); possessing approximately 1.6 grams of marijuana, in violation of 21 U.S.C. 844 (Count 2); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) (Count 3); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) (Count 4). Superseding Indictment 1-3.

On April 18, 2005, Freeman executed a written plea agreement, in which he agreed to plead guilty to all four counts in the indictment. Pet. App. G1-G9. In exchange, the government, inter alia, "agree[d] that a sentence of 106 months' incarceration [was] the appropriate disposition of this case." Id. at G4-G5. The agreement also noted Freeman's base offense level and anticipated criminal history category under the Guidelines. Ibid. Both

parties reserved the right to object to the criminal history calculation under the Guidelines. Ibid. The agreement provided that if the district court "refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed. R. 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and defendant will be allowed to withdraw the plea of guilty." Id. at G8. It further stated:

> Defendant agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors. * * * Defendant will not oppose imposition of a sentence incorporating the disposition provided for within this agreement, nor argue for any other sentence. If Defendant argues for any sentence other than the one to which he has agreed, he is in breach of this agreement.

Ibid. Freeman also agreed to waive the right to appeal his sentence or contest it pursuant to 28 U.S.C. 2255 "or otherwise." Id. at G6.

The district court accepted Freeman's guilty plea and, in its written order, noted that defendant had pleaded guilty "pursuant to a written Rule 11(c)(1)(C) plea agreement." Pet. App. F1.

b. The presentence investigation report (PSR) calculated a base offense level of 22 based on the drug-quantity table, Guidelines § 2D1.1 (2004), and a three-level reduction for acceptance of responsibility, which produced a total offense level of 19. Freeman PSR ¶¶ 22, 38-40, 43. The PSR assigned Freeman a category IV criminal history, which yielded a Guidelines range of 46 to 57 months of imprisonment, in addition to the 60-month

mandatory consecutive sentence required on Count 3. Id. ¶¶ 55, 67. The PSR noted that "[a]s the plea agreement in this case is pursuant to Rule 11(c)(1)(C), should the court reject the terms of the plea agreement * * * , the defendant would be allowed to withdraw his guilty pleas." Id. ¶ 68.

On July 18, 2005, pursuant to the Rule 11(c)(1)(C) plea agreement, the district court sentenced Freeman to 106 months of imprisonment, to be followed by five years of supervised release. Pet. App. E1-E4.

c. Section 3582(c)(2) of Title 18 provides that a district court

> may not modify a term of imprisonment once it has been imposed except that * * * in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission * * * the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2). In Amendment 706, the Sentencing Commission lowered by two levels the base offense level corresponding to each threshold quantity of crack cocaine listed in the drug quantity table in Guidelines § 2D1.1. Sentencing Guidelines App. C, Amend. 706 (effective Nov. 1, 2007). The Sentencing Commission then added Amendment 706 to the list of amendments in Guidelines § 1B1.10(c) that may be applied retroactively. Id., Amend. 713 (effective Mar. 3, 2008).

On June 5, 2008, pursuant to General Order 2008-01 of the District Court for the Western District of Kentucky, the district court directed the Probation Office to prepare a Memorandum of Recalculation in Freeman's case on whether Amendment 706 resulted in a lower Guidelines range; ordered the parties to file any objections to that memorandum; and appointed counsel to represent Freeman. Pet. App. D1-D2. In its Amended Memorandum of August 8, 2008, the Probation Office determined that the amendment resulted in a lower offense level (17) and Guidelines range (37 to 46 months), but that no sentence reduction was authorized because the original sentence was imposed pursuant to a binding plea agreement under Rule 11(c)(1)(C). Pet. App. H1-H3. Freeman filed a written objection, contending that a sentence reduction was authorized under Section 3582(c)(2) and Guidelines § 1B1.10(c) because the parties had selected the bottom of the then-applicable Guidelines range when they had agreed on a sentence of 106 months of imprisonment. Pet. App. I1-I2, I5-I6.

The district court denied Freeman's request for a sentence reduction under 18 U.S.C. 3582(c)(2). Pet. App. C1-C3. The court found that Freeman's "sentence was not based upon a guideline calculation, but rather the 106 months was agreed upon by the parties pursuant to Rule 11(c)(1)(C)," i.e., in an agreement "bind[ing] both the parties and the court." Id. at C3 (citing United States v. Peveler, 359 F.3d 369, 378 (6th Cir.), cert.

denied, 542 U.S. 911 (2004)).

2. a. On November 8, 2005, a federal grand jury returned an indictment charging Goins with two counts of possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C) (Counts 1, 4); possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B)(iii) (Count 3); and two counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) (Counts 2, 5). Indictment 1-3.

On May 11, 2006, Goins executed a written plea agreement, in which he agreed to plead guilty to Counts 1, 3, 4, and 5 in the indictment. 09-10246 Pet. App. F1-F12. The government, in turn, agreed to dismiss Count 2 and "agree[d] that a sentence of 14 years [of] imprisonment [was] the appropriate disposition of this case." Id. at F5. The agreement also noted Goins's expected offense level under the Guidelines and provided that his criminal history would be determined upon completion of the presentence investigation. Id. at F5-F7. Both parties reserved the right to object to the criminal history calculation and agreed not to seek a departure from the criminal history category under the Guidelines. Id. at F7. The agreement provided that if the district court "refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed. R. 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and

defendant will be allowed to withdraw the plea of guilty." Id. at F10. It further stated:

> Defendant agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors. * * * Defendant will not oppose imposition of a sentence incorporating the disposition provided for within this agreement, nor argue for any other sentence. If Defendant argues for any sentence other than the one to which he has agreed, he is in breach of this agreement.

Id. at F10-F11. Goins also agreed to waive the right to appeal his sentence or contest it pursuant to 28 U.S.C. 2255 "or otherwise," unless it exceeded 14 years of imprisonment. Id. at F7-F8.

The district court accepted Goins's guilty plea. Gov't C.A. Br. 3; Goins C.A. Br. 2.

b. The PSR calculated a base offense level of 30 based on the drug-quantity table, Guidelines § 2D1.1 (2005), and a three-level reduction for acceptance of responsibility, which produced a total offense level of 27. Goins PSR ¶¶ 25, 31-33. The PSR assigned Goins a category II criminal history, which yielded a Guidelines range of 78 to 97 months of imprisonment on the drug counts, in addition to the 60-month mandatory consecutive sentence on the firearm count. Id. ¶¶ 38, 52. The PSR noted that the 14-year (168-months) sentence agreed upon by the parties was longer than the total of Goins's Guidelines range (138-157 months) on the drug counts and the mandatory sentence on the firearm count. Id. ¶ 53.

At sentencing, defense counsel noted the parties' agreement that Goins be sentenced to 14 years of imprisonment and explained

that the agreed-upon prison term reflected, in part, "the dismissal of a gun charge, which could have increased his sentence dramatically." 09-10246 Pet. App. G4. The district court "conclude[d] that the plea agreement does state a fair sentence," noting that Goins could have faced "about 35 years." Id. at G6-G7. The court told Goins that he had made "a wise choice" by pleading guilty. Id. at G7. On August 10, 2006, pursuant to the Rule 11(c)(1)(C) agreement, the court sentenced him to 168 months (14 years) of imprisonment, to be followed by four years of supervised release. Id. at E1-E3, G8.

c. On July 30, 2008, pursuant to General Order 2008-01 of the District Court for the Western District of Kentucky and 18 U.S.C. 3582(c)(2), the district court directed the Probation Office to prepare a Memorandum of Recalculation in Goins's case on whether applying Amendment 706 would result in a lower Guidelines range; ordered the parties to file any objections to that memorandum; and appointed counsel to represent Goins. 09-10246 Pet. App. D1-D2. The Probation Office determined that the amendment resulted in a lower Guidelines range (63-78 months), but that no sentence reduction was authorized because the original sentence was imposed pursuant to a binding plea agreement under Rule 11(c)(1)(C). Id. at H2-H3. Goins filed a written objection, contending that the district court could consider reducing his sentence despite the Rule 11(c)(1)(C) plea agreement because the Guidelines had played

a part in the plea negotiation process. Id. at I1-I2.

Relying on the Sixth Circuit's decision in Peveler, supra, the district court denied Goins's request for a sentence reduction under 18 U.S.C. 3582(c)(2). 09-10246 Pet. App. C1-C2. The court noted that, in exchange for Goins's guilty plea, "the Government [had] agreed to dismiss Count 2, a second violation of 18 U.S.C. 924(c) which would have carried a statutory mandatory 25 year sentence, consecutive to any other sentence imposed." Id. at C1. The court also noted its belief "that the original sentence imposed and agreed upon by the parties pursuant to the Rule 11(c)(1)(C) [agreement] is reasonable and remains sufficient but not greater than necessary to satisfy the purposes of sentencing." Id. at C2.

3. Freeman and Goins each appealed the denial of his request for a sentence reduction. The court of appeals consolidated their appeals and affirmed. Pet. App. B1-B16.

The court held that Peveler "preclude[d] resentencing in each defendant's case." Pet. App. B3. The court explained that "[i]n Peveler, we held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement." Ibid. "Although Peveler's holding does not preclude reducing the sentence of a defendant who pled under Rule 11(c)(1)(C) where resentencing is necessary to avoid a miscarriage of justice," the court concluded

that "neither Goins nor Freeman falls within that exception." Id. at B3-B4.

The court explained that Goins's agreed-upon sentence (168 months) exceeded the high end of even the original (pre-Amendment 706) Guidelines range (138-157 months). Pet. App. B4. The court further explained that Goins had "entered into a carefully constructed agreement in which the parties balanced many factors -- including the charges to which Goins would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which Goins would be held responsible." Ibid. Because "[n]othing in th[e] record suggest[ed] that declining to resentence Goins works any injustice," the court concluded that "the district court did not err by holding Goins to the bargain he made." Id. at B4-B5.

As to Freeman, the court noted that, "[l]ike the defendant in Peveler, Freeman's original 106-month sentence remained inside the Guidelines range for his crime, even after the amendment" to the crack cocaine Guidelines. Pet. App. B5. Freeman's sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment," which, the court explained, was "a situation that the Peveler court contemplated and determined did not overcome the general prohibition on resentencing." Ibid. (citing Peveler, 359 F.3d at 379 n.4).

In a concurring opinion (Pet. App. B6-B16), Judge White agreed

that Peveler controlled the outcome of the case but stated that "Peveler construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended." Id. at B6. In her view, "[n]othing in [18 U.S.C. 3582(c)(2)] or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements." Id. at B10. "Were it not for Peveler," Judge White would have remanded both cases "with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate." Id. at B16.

ARGUMENT

Petitioners contend (Pet. 10-28; 09-10246 Pet. 9-26) that the court of appeals erred in holding that 18 U.S.C. 3582(c)(2) does not permit the district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. The decision below is correct. Although there is tension between the court's decision with respect to Freeman and United States v. Cobb, 584 F.3d 979 (10th Cir. 2009), reh'g en banc vacated and judgment reinstated, 603 F.3d 1201 (10th Cir. May 5, 2010), Cobb is an outlier. Moreover, the vast majority of Section 3582(c)(2) motions arising from the retroactive application of the 2007 amendment to the crack cocaine Guidelines have been adjudicated already, and the pool of affected Rule 11(c)(1)(C) defendants is finite and diminishing.

Further review is not warranted.

1. The court of appeals correctly determined that 18 U.S.C. 3582(c)(2) does not apply when a defendant has been sentenced pursuant to a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). Section 3582(c) sets forth the basic rule that a district "court may not modify a term of imprisonment once it has been imposed" and then specifies limited exceptions, including "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case" and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) provides that, "[i]f the court accepts the plea agreement * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). The district court thus has no authority to modify the sentencing agreement of the parties once it accepts the plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (c)(3)(A), and (c)(4); see, e.g., United States v. Pacheco-Navarette, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements."), cert. denied, 549 U.S. 892 (2006).

Accordingly, in the Rule 11(c)(1)(C) context, the district court imposes a sentence "based on" the agreement of the parties, regardless of whether that sentence correlates with the Sentencing Guidelines range. Although the court generally considers the applicable Guidelines range in determining whether to accept the plea agreement, see Guidelines § 6B1.2(c), that does not mean that the defendant is sentenced "based on" the Guidelines range. See, e.g., United States v. Cieslowski, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."), cert. denied, 546 U.S. 1097 (2006). The court may choose to accept a sentence or range specified by the parties' agreement and thereby become bound under the terms of the agreement and Rule 11(c)(1)(C), even if the sentence or range diverges from the Guidelines range. The parties' agreement to that sentence or range, once accepted, becomes the controlling basis for the court's sentencing decision.

Relatedly, the exercise of discretion under Section 3582(c)(2) would be inconsistent with the effect of Rule 11(c)(1)(C), which eliminates the court's sentencing discretion (except to the extent expressly conferred by the parties) once it accepts a plea agreement. The government will often give up the right to seek a higher sentence in exchange for the certainty of obtaining a

specific sentence. See, e.g., United States v. Scurlark, 560 F.3d 839, 842 (8th Cir.) (noting that "[e]ach party offered concessions to reach the [Rule 11(c)(1)(C)] agreement" and noting the benefits received by the defendant under the agreement), cert. denied, 130 S. Ct. 738 (2009). The contractual bargain, which becomes binding on the court after acceptance of the Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were interpreted to grant the court discretion to lower the agreed-upon sentence in light of developments not reflected in the parties' agreement.

The court of appeals therefore was correct to determine that the condition precedent to a Section 3582(c)(2) adjustment -- that the sentence be "based on" a Guidelines range (18 U.S.C. 3582(c)(2)) -- was not satisfied in these cases, where the sentences were imposed pursuant to Rule 11(c)(1)(C) plea agreements.[2] Both petitioners plainly benefitted from their plea agreements. Freeman obtained the certainty of a 106-month sentence, thereby avoiding a potentially longer sentence had the court sentenced him after considering the advisory Guidelines range. Goins obtained dismissal of a second firearm charge that, upon conviction, would have carried a 25-year mandatory minimum

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[2] Although both petitioners observe (Pet. 19; 09-10246 Pet. 18) that their agreements stated that each defendant "agrees to have his sentence determined pursuant to the Sentencing Guidelines" (see Pet. App. G5; 09-10246 Pet. App. F7), neither petitioner disputes that the agreement expressly invoked Rule 11(c)(1)(C) and that it was understood by the parties and the courts below as a specific-sentence agreement under that Rule. See Pet. App. B1-B2.

sentence (see 18 U.S.C. 924(c)(1)(C)(i)). Reducing petitioners' sentences under Section 3582(c)(2) would give them the benefit of their plea agreements while depriving the government of the concessions they knowingly made. The court of appeals' decision properly preserves the terms of the parties' bargain.

2. a. With one exception (discussed below), every court of appeals to have considered the issue has agreed, at least under petitioners' circumstances, that Section 3582(c)(2) does not permit a district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. See United States v. Rivera-Martinez, No. 09-1766, 2010 WL 2293251, at *2-4 (1st Cir. June 9, 2010); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010); United States v. Main, 579 F.3d 200, 203-204 (2d Cir. 2009), cert. denied, 130 S. Ct. 1106 (2010); United States v. Sanchez, 562 F.3d 275, 279-282 (3d Cir. 2009), cert. denied, 130 S. Ct. 1053 (2010); Scurlark, 560 F.3d at 841-842 (8th Cir.); Peveler, supra (6th Cir.); United States v. Trujeque, 100 F.3d 869, 870-871 (10th Cir. 1996); see also United States v. Heard, 359 F.3d 544, 548 (D.C. Cir. 2004) ("A sentence arising from a Rule 11(e)(1)(C) plea, however, does not result from the determination of an appropriate guidelines offense level, but rather from the agreement of the parties: an agreement that is binding on the court once it is accepted by the court."); cf. United States v. Bride, 581 F.3d 888,

890-891 (9th Cir. 2009).[5]

b. The Tenth Circuit is the exception. In Cobb, a divided panel held that "the district court has authority to reduce sentences imposed pursuant to Rule 11 pleas where, as here, the sentence was based at least in part on the then-applicable sentencing range." 584 F.3d at 985. The stipulated sentence in Cobb corresponded to the bottom of the originally applicable Guidelines range. Id. at 981. The panel majority attempted to distinguish its contrary decision in Trujeque, supra, on the ground that Trujeque "involved a stipulation to a sentence outside the later-lowered sentencing range." Id. at 983. But, as the dissent noted, the opinion in Trujeque "did not rely on that feature of the case." Id. at 988 (Hartz, J., dissenting). The Tenth Circuit subsequently granted the government's petition for rehearing en banc in Cobb, but, after oral argument was held, vacated that order and reinstated the panel's judgment. 603 F.3d 1201. Given that Cobb is an outlier, and that the en banc Tenth Circuit has not yet reached the merits of the issue, this Court's review is not warranted.

In any event, the facts of these cases make them poor vehicles

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[5] Petitioners' reliance on United States v. Dews, 551 F.3d 204 (4th Cir. 2008), vacated on reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009), is misplaced. See Pet. 13-15; 09-10246 Pet. 12-13. The grant of rehearing en banc in Dews vacated the panel's decision, and the Fourth Circuit subsequently dismissed Dews as moot. It thus cannot serve as a source of conflicting authority.

for deciding whether a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) agreement is ever eligible for a sentence reduction under Section 3582(c)(2). As even the concurring opinion below intimated (Pet. App. B16 n.4), Goins presumably would not prevail under Cobb's case-specific approach given that the sentence specified in his Rule 11(c)(1)(C) agreement -- not explicitly tied to any Guidelines calculation -- was above the top of the then-applicable Guidelines range. The district court imposed that sentence (168 months) even though the court had determined the applicable Guidelines range (138-157 months) to be lower. See 09-10246 Pet. App. G6; Statement of Reasons 1. Although the sentence specified in Freeman's plea agreement (106 months) was at the bottom of his then applicable Guidelines range (106-117 months), the agreement did not explicitly tie that sentence to the Guidelines and it still fell within the revised range produced by applying Amendment 706 (97-106 months). See Peveler, 359 F.3d at 378 n.4.

c. The Fifth and Seventh Circuits have recently indicated that, under certain limited circumstances, a defendant who pleaded guilty pursuant to a Rule 11(c)(1)(C) agreement may be entitled to a Section 3582(c)(2) sentence reduction, but those circumstances are not present in Freeman's or Goins's case.

In Franklin, Supra, and United States v. Ray, 598 F.3d 407, 409-411 (2010), the Seventh Circuit held that the defendant was not

entitled to a Section 3582(c)(2) sentence reduction because he had entered into a Rule 11(c)(1)(C) plea agreement for a specific sentence. In each case, the Seventh Circuit -- relying, inter alia, on the fact that the plea agreement did not explicitly tie the specified sentence to the Guidelines or explain how the parties arrived at the figure -- reasoned that the plea agreement did not reflect an intent by the parties to tie the sentence to the Guidelines. See Franklin, 600 F.3d at 896; Ray, 598 F.3d at 409. The Seventh Circuit suggested, however, that if, for example, the plea agreement explicitly provided that the term of imprisonment was to be a certain percentage below or at the bottom of the applicable Guidelines range, that might yield a different outcome. See Franklin, 600 F.3d at 897; Ray, 598 F.3d at 410. The decisions in Franklin and Ray are consistent with the decision below. The Rule 11(c)(1)(C) agreements for Freeman and Goins each specified the sentence to which the parties had agreed without explicitly tying that sentence to the Guidelines or explaining how they arrived at the specific figure. Their Rule 11(c)(1)(C) sentences, therefore, were not "based on" the Guidelines. Because neither Freeman's nor Goins's agreement made its sentence contingent on a Guidelines calculation, the decision below does not implicate the hypothetical circumstances set forth in the Seventh Circuit cases.

In United States v. Garcia, No. 08-50458, 2010 WL 1816619 (May 7, 2010), the Fifth Circuit held that the district court had

authority to grant a limited sentence reduction under Section 3582(c)(2) to a defendant who had pleaded guilty under Rule 11(c)(1)(C). Id. at *2-*4. The plea agreement in that case provided for a minimum sentence of 240 months of imprisonment and called on the district court to take into account the Guidelines when imposing the ultimate sentence. Id. at *1. The district court sentenced the defendant to 262 months of imprisonment -- the top of the calculated Guidelines range -- and subsequently reduced his sentence based on Amendment 706, but only to 240 months, which was above the amended range (168-210 months). Ibid. The Fifth Circuit held that the court had authority to reduce the defendant's sentence because, despite specifying a minimum term of imprisonment, the agreement permitted the district court to select a greater term pursuant to the Guidelines. Id. at *3. The court rejected the defendant's claim that he was entitled to a reduction below the minimum term specified in the agreement, because that minimum term "was unmoored from any guidelines calculation" and because "[w]hen the sentencing guidelines for crack offenses changed, bringing down the high end of [defendant]'s range, his negotiated minimum stayed put." Ibid.

The type of agreement at issue in Garcia -- which established a floor above which the district court could sentence the defendant depending on the court's Guidelines calculations -- is not present in the instant cases. Freeman and Goins each agreed to a fixed

sentence by pleading guilty under Rule 11(c)(1)(C). The decision below thus does not conflict with Garcia. Further review is not warranted.[4]

3. This Court's review is also unnecessary because the vast majority of Section 3582(c)(2) motions arising from the retroactive application of the 2007 amendment to the crack cocaine Guidelines have been adjudicated, and the pool of affected Rule 11(c)(1)(C) defendants is finite and diminishing. The Sentencing Commission estimated that 19,500 defendants would be affected by making Amendment 706 retroactive. See Memorandum from Glenn Schmitt et al., United States Sentencing Commission 4-5 (Oct. 3, 2007), http://www.ussc.gov/general/Impact_Analysis_20071003.3b.pdf. It appears that approximately 17,500 of those defendants have had their Section 3582(c)(2) motions adjudicated already, with 15,778 sentence reductions granted as of May 2010. See United States

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[4] Petitioners erroneously contend that the Third Circuit's decision in Sanchez allows a district court to reduce the sentence of a Rule 11(c)(1)(C) defendant under Section 3582(c)(2) if that court considered the Guidelines when accepting the plea, pointing to the language in Sanchez that "a sentence is 'based on' whatever the District Court considered in imposing it." Pet. 22 (quoting Sanchez, 562 F.3d at 282 n.8); 09-10246 Pet. 21 (same). In the same footnote quoted by petitioners, the Third Circuit clarified: "Where, as here, the District Court accepted a so-called "C" plea agreement, the answer [to what the sentence is 'based on'] is simple: the sentence is based on the terms expressly agreed on by the defendant and the government." Sanchez, 562 F.3d at 282 n.8. The court in Sanchez therefore held, consistent with the decision below, that a defendant who pleaded guilty under Rule 11(c)(1)(C) is categorically ineligible for a Section 3582(c)(2) sentence reduction.

Sentencing Commission, Preliminary Crack Cocaine Retroactivity Data Report, Tbls. 2 and 5 (May 2010), http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_May.pdf (May 2010 Report).[5] Although the Sentencing Commission's statistics do not indicate how many of the remaining defendants were sentenced pursuant to binding Rule 11(c)(1)(C) agreements, that number presumably decreases by the day (as a function of ongoing adjudications as well as mootness issues).

This Court has repeatedly denied petitions for certiorari raising the same question as presented in these petitions. See Tucker v. United States, 130 S. Ct. 1880 (2010); May v. United States, 130 S. Ct. 1880 (2010); Eggleston v. United States, 130 S. Ct. 1507 (2010); Clayborn v. United States, 130 S. Ct. 1015 (2009); Scurlark (p. 15, supra); Sanchez (p. 16, supra). Although those denials predate the Tenth Circuit's recent vacatur of its grant of rehearing and reinstatement of the panel's judgment in Cobb, the passage of time, in addition to the other foregoing reasons, makes denial of further review appropriate here as well.

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[5] Table 2 of the May 2010 Report indicates that district courts have decided a total of 24,058 Section 3582(c)(2) motions arising from retroactive application of Amendment 706. Of the 8280 denials, only 1857 were filed by defendants previously identified by the Commission as eligible to seek a sentence reduction. See May 2010 Report, Tbl. 5 n.1. Combining the 15,778 grants with the 1857 denials suggests that 17,535 of the 19,500 defendants identified by the Commission have had their Section 3582(c)(2) motions adjudicated.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 09-10245 and 09-10246

WILLIAM FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ANTONIO GOINS

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION,** via e-mail and first class mail, postage prepaid, on this 16th day of June, 2010.

SEE ATTACHED SERVICE LIST

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Counsel of Record

June 16, 2010

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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REPLY BRIEF

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No. 09-10245

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

WILLIAM FREEMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Comes the petitioner, William Freeman, by counsel, pursuant to Supreme Court Rule 15.6, and respectfully submits the following reply brief.

1. The Circuit Courts are split on the Question Presented.

The government acknowledges that there is a "tension" between the Sixth Circuit decision in petitioner's case and the Tenth Circuit's decision in *United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009). (Brief in Opposition, p. 12) Although the government describes *Cobb* as an "outlier," (Brief in Opposition, p. 17), the fact remains that *Cobb* reflects a split among the circuits on the question of whether defendant is ineligible for a sentence modification under 18 U.S.C. §3582(c)(2) solely because he or she entered a guilty plea pursuant to Fed.R.Crim.P. 11(c)(1)(C) (hereafter C plea).

The circuit split is not illusory. Indeed, the First Circuit in addressing the same issue as that presented in petitioner's case pointedly stated, "**This appeal raises an issue**, new to this court, **that has fomented a circuit split**: Is a defendant who was sentenced pursuant to a binding C-type plea agreement, Fed.R.Crim.P. 11(c)(1)(C), for conspiring to distribute crack cocaine entitled to a sentence reduction by reason of retroactive amendments to the sentencing guidelines designed to lower sentences for crack cocaine offenses?" *United States v. Rivera-Martinez*, ___ F.3d ___ (1st Cir.

2010), 2010 WL 2293251, *1 (6-9-10) (emphasis added).

The First Circuit further noted that the Courts of Appeals have employed "**varying rationales**" to rule that district courts do not have authority under 18 U.S.C. §3582(c)(2) to modify a sentence imposed pursuant to a C plea agreement. *United States v. Rivera-Martinez*, ___ F.3d at ___, 2010 WL 2293251, *2 (emphasis added). The court observed that some circuits utilize a "categorical approach" to resolve the issue, while others take a "case-by-case" approach on the matter. *Id.* [1] The First Circuit's observation underscores the need for Court to grant *certiorari* in order to provide the lower courts with guidance to ensure that the issue presented is resolved with a consistent rationale.

---

[1] According to the First Circuit, cases adopting a categorical approach include *United States v. Green*, 595 F.3d 432, 436 (2nd Cir. 2010); *United States v. Sanchez*, 562 F.3d 275 (3rd Cir. 2009), *cert.* denied ___ U.S. ___, 130 S.Ct. 1053 (2010); *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004), *cert.* denied 542 U.S. 911 (2004) and *United States v. Scurlark*, 560 F.3d 839 (8th Cir. 2009), *cert.* denied ___ U.S. ___, 130 S.Ct. 738 (2009). See *United States v. Rivera-Martinez*, ___ F.3d at ___; 2010 WL 2293251, *2.

Cases resolving the issue on a case-by-case basis include *United States v. Garcia*, 606 F.3d 209, 214 (5th Cir. 2010) and *United States v. Franklin*, 600 F.3d 893, 896 (7th Cir. 2010). See *United States v. Rivera-Martinez*, ___ F.3d at ___; 2010 WL 2293251, *2. See also *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) *cert.* denied ___ U.S. ___, 130 S.Ct. 1160 (2010) ("the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission.").

2. Petitioner's C plea agreement is "based on" the Guidelines.

The government (Brief in Opposition, pp. 13-14) maintains that petitioner was sentenced pursuant to a plea agreement and not pursuant to the Guidelines. The record, however, reflects that petitioner's plea agreement is "based on" the Guidelines which makes a substantial, analytical difference even in those circuits where the defendant has not prevailed on the issue presented. For example, in *United States v. Ray*, 598 F.3d 407 (7th Cir.2010) a crack defendant, who entered a C plea, was denied a §3582(c)(2) sentence modification because his sentence was "based on" the plea agreement and not on the Guidelines. The Seventh Circuit stated:

> In the absence of explicit language in the agreement to the contrary, a sentence imposed pursuant to a Fed.R.Crim.P. 11(c)(1)(C) plea agreement cannot be said to be "based on" the Sentencing Guidelines. An agreement must clearly reflect an intent that the sentence be modified when the Guidelines shift. [The defendant's] plea agreement did not reflect such an intent. That being so, the district court was correct to conclude that [the defendant's] sentence was not based on the Guidelines and that, as a result, he could not bring a 18 U.S.C. § 3582(c)(2) motion.

Ray, 598 F.3d at 411. In *United States v. Franklin*, 600 F.3d 893, 894 (7th Cir. 2010) a crack defendant was denied a §3582(c)(2) sentence modification because his sentence was "based on" his Fed.R.Crim.P. 11(e)(1)(C) (the predecessor to Rule 11(c)(1)(C)) plea agreement and not on the Guidelines. Although the defendant in *Franklin* was denied relief because "[a]s in *Ray*, the plea agreement . . . did not state

that [his sentence] was based upon the guidelines, and it did not explain how the parties chose [that sentence]," the Seventh Circuit did not view a C plea as a categorical bar to a §3582(c)(2) sentence modification. *Franklin*, 600 F.3d at 896. The court explained:

> We make clear, however, that our decisions today and in *Ray* do not mean that all Rule 11(c)(1)(C) plea agreements foreclose relief under section 3582(c)(2). If, for example, Franklin's plea agreement had provided that the term of imprisonment was to be '40% below the low end of the guidelines range,' or had agreed that 'the defendant will receive the low end of the applicable guideline range,' then the government agrees that the plea would be "based on" a guidelines range for section 3582(c)(2) purposes. The district court noted as much, stating in the hearing on the section 3582(c)(2) motion in this case that 'if there is an agreed sentence based on a guideline calculation, like 20 percent of the low end of the guidelines, then with the new crack amendments we go down and we recalculate it. We've been doing those by agreement pretty routinely.' We also acknowledged in *Ray* that a situation like the one in *United States v. Cobb*, 584 F.3d 979 (10th Cir.2009), where the defendant agreed to a 168-month term which the agreement stated was 'the bottom of the applicable guideline range,' might yield a different outcome. See *Ray*, 598 F.3d 407, 410. These other scenarios do not exist in our case, however, and we affirm the decision of the district court.

Franklin, 600 F.3d at 897. Thus, it is the plea agreement itself and not whether it is entered under Fed.R.Crim.P. 11(c)(1)(A), (B), or (C), that is the decisive factor in determining if a defendant is eligible for a §3582(c)(2) sentence modification. "One must examine the intent of the plea agreement, which, of course, is the ultimate basis of the sentence." *United States v. Ray*, 598 F.3d at 409. The First Circuit also recognized this point in *United States v. Rivera-Martinez*, ___ F.3d at ___, 2010 WL

2293251, *5 which is another case in which a defendant who entered a C plea was deemed ineligible for a §3582(c)(2) sentence modification.

The First Circuit explained in *Rivera-Martinez*,

> When a C-type plea is at issue, it is the terms of the agreement, not the process of arriving at those terms or the external considerations bearing upon them, that dictate the sentence to be imposed . . . Absent an express statement in the plea agreement making the sentence dependent upon a guideline calculation, a sentence imposed pursuant to a C-type plea agreement is based on the agreement itself, not on the guidelines.

Id. ___ F.3d at ___, 2010 WL 2293251, *3 (other citations omitted). The court further noted, "the pact contains no forecast of a guideline sentencing range (GSR) ..." *Id.* ___ F.3d at ___, 2010 WL 2293251, *1. "Indeed, the instant plea agreement does not even contain the ingredients from which a GSR could be calculated. It is not only silent as to the defendant's criminal history category but also states explicitly that the parties have not reached a consensus on that subject. Thus, it is impossible, within the four corners of the plea agreement, even to calculate the GSR.." *Id.* ___ F.3d at ___, 2010 WL 2293251, *5, fn. 4.

In contrast to *Ray*, *Franklin*, and *Rivera-Martinez*, petitioner's C plea agreement clearly linked the Guidelines to the agreed sentence. Under the terms of his plea agreement, petitioner agreed "to have his sentence determined pursuant to the Sentencing Guidelines." (Volume (Vol.) I, Appendix to *Cert.* Pet. (Apx.) G 5). The parties calculated a base offense level of 22 minus 3 levels for acceptance of

responsibility for an adjusted offense level of 19. *Id.* The parties anticipated a criminal history category of IV but agreed it would be determined upon completion of the Presentence Investigation Report (PSR). *Id.* In addition, petitioner's plea agreement did not waive any right to a §3582(c)(2) sentence modification (a fact that the government ignores).

The parties agreed to a sentence of 106 months, of which 60 months comprised a mandatory minimum for a firearm conviction under 18 U.S.C. §924(c) that by statute had to run consecutive to the sentence on the drug charges. The PSR reflects that petitioner's total offense level was 19 and his criminal history category was IV which resulted in a Guidelines sentencing range of 46 - 57 months. (Vol. II (sealed), Apx. I. 4-8). Thus, his agreed sentence was within the sentencing range that was lowered by Guidelines Amendment 706. As the original and amended Memorandums of Recalculation (MOR) reflect, Amendment 706 reduced petitioner's total offense level to 17 and with a criminal history category of IV, the Guidelines range was reduced to 37 - 46 months. (Vol. II (sealed), Apx. H 2-3; Apx. K 2-3). Accordingly, petitioner was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. §3582(c)(2).

Franklin, *Ray*, and *Rivera-Martinez* demonstrate that the circuits have taken

different approaches to resolving the issue presented in this case. As it stands now, eligibility for a §3582(c)(2) sentence modification for a defendant who enters a C plea depends upon the circuit in which the case is prosecuted. That situation creates a measure of arbitrariness which inevitably leads to inconsistent results and thereby undermines the administration of justice. Petitioner's case illustrates the effects of the circuit split because he is categorically ineligible for a §3582(c)(2) sentence modification not only in the Sixth Circuit (*Peveler*) but also in the Second, Third, and Eighth Circuits. (See fn. 1 on p. 2 of this reply brief). Yet, he would be eligible in the Tenth Circuit under *United States v. Cobb*, *supra*, and the particular circumstances of his plea agreement would determine his eligibility in the Fifth, Seventh, and Ninth Circuits. See *Garcia*, *Franklin*, *Ray*, and *Bride*, all *supra*. *Certiorari* should be granted to determine whether a categorical or case-by-case approach should be taken to resolve the issue presented. A decision on the merits will ensure uniform analysis and consistent results in the circuits.

3. Petitioner's case is an excellent vehicle for deciding the issue presented.

As shown in the preceding section, petitioner's case allows the Court to decide which approach to use in resolving the question of whether a defendant who enters a C plea is eligible for a §3582(c)(2) sentence modification. Moreover, the facts underlying petitioner's case are straightforward and squarely present the issue

because his plea agreement was based on Fed.R.Crim.P. 11(c)(1)(C) and his Guidelines sentencing range was lowered by Amendment 706. The circumstances of petitioner's case thus lend themselves to resolving the issue presented with clarity and finality.

The government argues that review is unnecessary because the "vast majority"of crack cases involving Guidelines Amendment 706 have been adjudicated "and the pool of affected Rule 11(c)(1)(C) defendants is finite and diminishing." (Brief in Opposition, p. 21). Even if that is true, the government's view of the issue is shortsighted. This is not about a single case involving a single defendant. Rather, this case involves an important issue that is likely to recur. While the issue is grounded in the retroactive application of Amendment 706 and its interplay with Fed.R.Crim.P. 11(c)(1)(C), it does not stop there. There will undoubtedly be future Amendments to the Guidelines, some of which will apply retroactively and there will undoubtedly be future defendants who enter guilty pleas pursuant to Rule 11(c)(1)(C). All of those factors will intersect in future cases. Indeed, *Peveler*, *supra*, on which the ruling in petitioner's case is based, and *United States v. Trujeque*, 100 F.3d 869, 870 (10th Cir. 1996) involve retroactive Guidelines amendments that affected crimes other than crack offenses. *Peveler*, which was decided in 2004, involved the retroactive application of Guidelines Amendment 599 which effected the defendant's

firearms conviction under 18 U.S.C. §924(c). In *Trujeque*, a 1996 case, the issue presented by petitioner's case arose when Guidelines Amendment 488 was given retroactive effect and reduced the base offense level for crimes involving LSD. *Peveler* and *Trujeque* demonstrate the recurring nature of the issue presented in petitioner's case and, as shown above, the circuits are split not only on the issue of eligibility for a §3582(c)(2) sentence modification but they are also split on the proper, analytical approach to resolving that issue. All of those factors make petitioner's case worthy of review.

Within the larger issue of whether a C plea renders a defendant ineligible for a §3582(c)(2) sentence modification, there is another issue that is equally important to the administration of justice, i.e., if the defendant enters a C plea does he or she waive any chance for a §3582(c)(2) sentence modification? If so, all participants in the plea bargaining process, especially the defendant, need to know precisely what is being waived by the entry of a C plea. Since "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system," *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), a ruling on the issue presented in petitioner's case will have a significant and long term impact on the day-to-day practice of criminal cases in federal courts.

Finally, the government argues that *certiorari* should be denied because the

Court has denied other petitions that have raised the issue presented in the case at bar. (Brief in Opposition, p. 22). Petitioner respectfully submits that the procedural history of this Court's recent decision in *Dillon v. United States*, 560 U.S. ___, 2010 WL (2400109) (6-17-10) refutes the government's argument. As a ground for denying *certiorari* in *Dillon*, the government pointed out that the Court had "recently denied a number of petitions" that raised the same issue as that presented in *Dillon*. See Brief for United States in Opposition, *Dillon v. United States*, No. 09-6338, 2009 WL 4559228, *3. Petitioner respectfully submits that the denial of *certiorari* in other cases does not control how the Court should rule in this case. For the reasons stated above, the issue presented by petitioner's case is worthy of review.

CONCLUSION

For the foregoing reasons, the petitioner, William Freeman, by counsel, respectfully submits that the Court should grant his petition for a writ of *certiorari*.

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No. 09-10245

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

WILLIAM FREEMAN, PETITIONER,

vs.

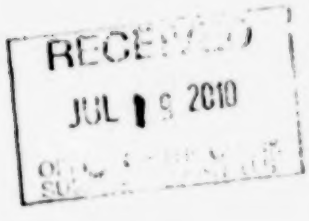
UNITED STATES OF AMERICA, RESPONDENT.

PROOF OF SERVICE

I, Frank W. Heft, Jr., a member of the Bar of this Court, state that on July 9, 2010, as required by Supreme Court Rule 29, I have served a copy of the enclosed Reply Brief for Petitioner by depositing it with the United States Postal Service, with first class postage prepaid, properly addressed to:

Honorable Neal Kumar Katyal
Acting Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

All parties required to be served have been served.



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JOINT APPENDIX

REDACTED
PUBLIC VERSION

No. 09-10245

NOV 30 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM FREEMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 7, 2010
CERTIORARI GRANTED SEPTEMBER 28, 2010

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APPENDIX A — RELEVANT DOCKET ENTRIES

U.S. District Court
Western District of Kentucky (Louisville)
CRIMINAL DOCKET FOR CASE #:
3:04-cr-00098-EHJ-1

Date Filed	#	Docket Text
01/04/2005	16	SUPERSEDING INDICTMENT as to William Freeman (1) count(s) 1s, 2s, 3s, 4s, 5s-6s. (Attachments: #1 Cover Sheet) (CSD) (Entered: 01/04/2005)
		* * *
01/10/2005		Arraignment as to William Freeman (1) Count 1s,2s,3s,4s,5s-6s held on 1/10/2005 before Senior Judge Edward H. Johnstone
		* * *
04/18/2005	26	ORDER for proceedings held before Senior Judge Edward H. Johnstone: Change of Plea Hearing as to William Freeman held on 4/18/2005, Plea entered by William Freeman (1) Guilty Count 1s, 2s, 3s, 4s. Sentencing set for 7/18/2005 10:00 AM in Courtroom before Senior Judge Edward H. Johnstone. (Court Reporter Carola Strijek.) cc:Counsel, USM, USPO (CSD) (Entered: 04/18/2005)

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04/18/2005	27	**PLEA AGREEMENT as to William Freeman. (CSD) (Entered: 04/19/2005)**

* * *

07/19/2005	30	**JUDGMENT and COMMITMENT ORDER by Edward H. Johnstone on 7/18/05; Sentencing held on 7/18/2005 as to William Freeman (1), Count 1s, Imprisonment 46 months (concurr with Counts 2 and 4); Supervised Release 3 years (concurr); SPA $100.; Count 2s, Imprisonment 12 months as to Count 2 (concurr with Counts 1 and 4); Supervised Release 1 year (concurr); SPA $100; Count 3s, Imprisonment 60 months as to Count 3 (consecutive to Counts 1, 2 and 4); Supervised Release 5 years (concurr); SPA $100; Count 4s, Imprisonment 46 months (concurr with Counts 2 and 4); Supervised Release 3 years (concurr); SPA $100. cc: Counsel; USM; USP; Finance (SDB) (Entered: 7/19/2005)**

Appendix A

07/20/2005	31	REDACTED

* * *

06/09/2008	38	**ORDER by Senior Judge Edward H. Johnstone on 6/5/08 as to William Freeman: Scott Wendelsdorf appointed to represent Dft; Clerk to file under seal USP's MOR and attachments; Clerk to serve defense counsel and USA with copy of MOR and attachments; Clerk to serve Dft with copy of MOR, PSR and J&C; any objections or request for hearing due within 30 days; objections to be filed conventionally under seal; Clerk to return MOR to USP upon entry of order on recalculation of sentence. cc: counsel, Dft (NM) (Entered: 06/09/2008)**
06/09/2008	39	REDACTED

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07/07/2008	40	NOTICE of no objections re Memorandum of Recalculation by William Freeman re 38 Order. (Scanned 07/09/2008) (CSD) (Entered: 07/09/2008)
07/30/2008	41	MOTION for Retroactive Application of Sentencing Guidelines to Crack Cocaine Offense 18 USC 3582 by William Freeman. (KJS) (Entered: 07/31/2008)
08/28/2008	42	ORDER denying as moot 41 Motion to Reduce Sentence re Crack Cocaine Offense - 18:3582 as to William Freeman (1); counsel for defendant directed to contact defendant and notify Court w/in 30 days. Signed by Senior Judge Edward H. Johnstone on 08/27/2008. cc:counsel (CSD) (Entered: 08/28/2008)
08/29/2008	43	ORDER by Senior Judge Edward H. Johnstone on 08/27/2008 as to William Freeman; clerk to file USPO's revised Memorandum of Recalculation under seal; clerk to serve counsel with copy of revised MOR and all attachments; clerk

		to serve dft with copy of revised MOR; parties to file objections under seal by 9/29/2008; clerk directed to return MOR and all attachments to USP after entry of order on recalculation. cc:counsel, defendant (CSD) Modified on 8/29/2008 to correct docket text (CSD). (Entered: 08/29/2008)
08/29/2008	44	REDACTED
		* * *
10/15/2008	47	REDACTED
		* * *
11/04/2008	50	REDACTED
12/31/2008	51	MEMORANDUM OPINION & ORDER DENYING SENTENCE REDUCTION RE CRACK COCAINE OFFENSE 18 USC 3582 cc:counsel (CSD) (Entered: 12/31/2008)

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01/13/2009	52	NOTICE OF APPEAL by William Freeman re 51 Order. (Wendelsdorf, Scott) Modified on 1/14/2009 to delete filing fee paid(CSD). (Entered: 01/13/2009)

* * *

11/19/2010	57	FILING OF OFFICIAL TRANSCRIPT of Sentencing Hearing as to William Freeman held on July 18, 2005, before Senior Judge Edward H. Johnstone. Court Reporter/ Transcriber Dena Legg. Telephone number 502-625-3778. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/10/2010. Redacted Transcript Deadline set for 12/20/2010. Release of Transcript Restriction set for 2/17/2011. (CSD) (Entered: 11/19/2010)

* * *

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11/22/2010	59	**FILING OF OFFICIAL TRANSCRIPT of Change of Plea Hearing as to William Freeman held on 04/18/2005, before Judge Edward H. Johnstone.**

* * * *

Appendix A

United States Court of Appeals
for the Sixth Circuit
CRIMINAL DOCKET FOR CASE:
Nos. 08-6374, 09-5047

Dated Filed	Docket Text
01/15/2009	Criminal Case Docketed. Notice filed by Appellant Mr. William Freeman. Transcript needed: n. (AC)
	* * *
02/24/2009	APPELLANT BRIEF filed by Mr. Frank W. Heft, Jr. for Mr. William Freeman. Certificate of Service: 02/24/2009. Argument Request: requested. (FWH)
	* * *
03/19/2009	APPELLEE BRIEF filed by Ms. Monica Wheatley for USA. Certificate of Service: 03/19/2009. Argument Request: waived. (MW)
03/25/2009	REPLY BRIEF filed by Attorney Mr. Frank W. Heft, Jr. for Appellant Mr. William Freeman. Certificate of Service: 03/25/2009. (FWH)
	* * *

Appendix A

06/11/2009	MOTION filed by Mr. Frank W. Heft, Jr. for Mr. William Freeman to consolidate 08-6374 with 09-5047 for submission purpose. Certificate of Service: 06/11/2009.--[Edited 06/11/2009 by AC] (FWH)
	* * *
06/24/2009	ORDER filed GRANTING Appellant's motion to consolidate cases 08-6374 and 09-5047 filed by Mr. Frank W. Heft, Jr. for Antonio Goins and William Freeman. Entered by order of the court. [08-6374, 09-5047] (PJE)
	* * *
08/04/2009	CAUSE ARGUED by Mr. Frank W. Heft, Jr. for Appellant Antonio Goins and Mr. Terry M. Cushing for Appellee USA in 08-6374, Mr. Frank W. Heft, Jr. for Appellant Mr. William Freeman and Mr. Terry M. Cushing for Appellee USA in 09-5047 before Judges Boggs, Rogers and White. [08-6374, 09-5047] (KSC)

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11/20/2009	OPINION filed: AFFIRMED, decision not for publication pursuant to local rule 28(g). Danny J. Boggs, Circuit Judge; John M. Rogers, Authoring Circuit Judge and Helene N. White, Circuit Judge. [08-6374, 09-5047] (NB)
11/24/2009	OPINION CORRECTION LETTER sent indicating revisions to unpublished opinion filed 11-20-09. Attached dissenting opinion of Judge White. [08-6374, 09-5047] (PJE)
12/04/2009	PETITION for en banc rehearing filed by Mr. Frank W. Heft, Jr. for Mr. William Freeman. Certificate of Service: 12/04/2009. (BLH)
01/12/2010	ORDER filed denying the petitions for en banc rehearing [4098167-2], [4098179-2] filed by Mr. Frank W. Heft, Jr. for Antonio Goins and Mr. William Freeman. Danny J. Boggs, John M. Rogers, Helene N. White, Circuit Judges. [08-6374, 09-5047] (BLH)

Appendix A

01/21/2010	**MANDATE ISSUED with no costs taxed. (AC)**

* * *

APPENDIX B — SUPERSEDING INDICTMENT RETURNED JANUARY 4, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

UNITED STATES OF AMERICA

v.

WILLIAM FREEMAN

SUPERSEDING INDICTMENT

NO. 3:04CR-98-J

18 U.S.C. § 922 (g) (1)
18 U.S.C. § 924 (a) (2)
18 U.S.C. § 924 (c) (1) (A)
18 U.S.C. § 924(d)
21 U.S.C. § 841 (a) (1)
21 U.S.C. § 841 (b) (1) (C)
21 U.S.C. § 844
21 U.S.C. § 853
28 U.S.C. § 2461

The Grand Jury charges:

COUNT 1

On or about September 14, 2004, in the Western District of Kentucky, Jefferson County, Kentucky, the defendant,

Appendix B

WILLIAM FREEMAN, knowingly and intentionally possessed with intent to distribute approximately 3.42 grams of a mixture and substance containing cocaine base commonly known as "crack" cocaine, a controlled substance as defined by 21 U.S.C. § 812.

In violation of Title 21, United States Code, Sections 841 (a) (1) and 841 (b) (1) (C).

The Grand Jury further charges:

COUNT 2

On or about September 14, 2004, in the Western District of Kentucky, Jefferson County, Kentucky, the defendant, **WILLIAM FREEMAN**, knowingly and intentionally possessed approximately 1.6 grams of marijuana, a Schedule I controlled substance, as defined by 21 U.S.C. § 812.

In violation of Title 21, United States Code, Section 844.

The Grand Jury further charges:

COUNT 3

On or about September 14, 2004, in the Western District of Kentucky, Jefferson County, Kentucky, the defendant, **WILLIAN FREEMAN**, in furtherance of a drug trafficking crime for which he may be prosecuted

in a court of the United States, possessed a firearm, to wit, a Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621 loaded with five rounds of .380 caliber ammunition.

In violation of Title 18, United States Code, Section 924 (c) (1) (A).

The Grand Jury further charges:

COUNT 4

On or about September 14, 2004, in the Western District of Kentucky, Jefferson County, Kentucky, the defendant, **WILLIAM FREEMAN**, being a person who had been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, that is: on March 23, 2004, **FREEMAN** was convicted of two counts of Complicity to Wanton Endangerment in the First Degree, and Receiving Stolen Property over $300, in case number 03CR2500 in Jefferson Circuit Court, Louisville, Kentucky, knowingly possessed in and affecting interstate commerce a firearm, that is, a loaded Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621.

In violation of Title 18, United States Code, Sections 922 (g) (1) and 924 (a) (2).

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The Grand Jury further charges:

COUNT 5

FORFEITURE

As a result of committing offenses in violation of 21 U.S.C. § 841(a) (1), as alleged in Count 1 of this Indictment, a felony punishable by imprisonment for more than one year, the defendant, **WILLIAM FREEMAN**, shall forfeit to the United States pursuant to 21 U.S.C. § 853, any and all property constituting, or derived from, proceeds said defendant obtained, directly or indirectly, as a result of the said offenses, and any and all of defendant's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the said violation alleged in Count 1 of this Indictment.

The Grand Jury further charges:

COUNT 6

FORFEITURE

As a result of committing offenses in violation of 18 U.S.C. §§ 922 (g) (1), 924 (a) (2), and 924 (c) (1) (A), as alleged in Counts 3 and 4 of this Indictment, felonies punishable by imprisonment for more than one year, the defendant, **WILLIAM FREEMAN**, shall forfeit to the United States pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461, all firearms and ammunition involved in the commission of the offense, including, but not limited to a Davis Industries,

Appendix B

.380 caliber, P-380 pistol, bearing serial number AP102621 and ammunition.

A TRUE BILL.

/s/_____
FOREPERSON

_____
DAVID L. HUBER
UNITED STATES ATTORNEY
DLH: JEL: 050103

Appendix B

UNITED STATES OF AMERICA v.
WILLIAM FREEMAN

PENALTIES

Count 1: NM 20 yrs./$1,000,000/both/NL 3 yrs. Supervised Release

Count 2: NM 1 yr./NL $1,000 NM $100,000/both/NM 1 yr. Supervised Release

Count 3: NL 5 yrs. consecutive/$250,000/both/NM 3 yrs. Supervised Release

Count 4: NM 10 yrs./$250,000/both/NM 3 yrs. Supervised Release

Counts 5 & 6: Forfeiture

Appendix B

No. 3:04CR-98-J

UNITED STATES DISTRICT COURT

Western District of Kentucky Louisville Division

THE UNITED STATES OF AMERICA

vs.

WILLIAM FREEMAN

SUPERSEDING INDICTMENT
Title 21, U.S.C. §§ 841(a)(1); 841(b)(1)(C); 844; 853;
Title 18, U.S.C. §§ 92(c)(1)(A); 922(g)(1); 924(a)(2); 924(d);
Title 28, U.S.C. § 2461:
Possession With Intent to Distribute Crack Cocaine; Possession of Marijuana; Possession of Firearm in Furtherance of Drug Trafficking Crime; Felon in Possession of a Firearm;
Forfeiture.

Wire Fraud.

A true bill
/s/ _____
Foreman

Appendix B

Filed in open court this 4th day,
of January A.D. 2005.

_____
Clerk

FILED
Jeffrey A. Apperson, Clerk
JAN 04 2005
U.S. DISTRICT COURT
WEST'N DIST. KENTUCKY

APPENDIX C — PLEA AGREEMENT ENTERED PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 11(c)(1)(C) ON APRIL 18, 2005

CRIMINAL NO. 3:04CR-98-J

UNITED STATES OF AMERICA

PLAINTIFF

v.

WILLIAM FREEMAN

DEFENDANT

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States of America, by David L. Huber, United States Attorney for the Western District of Kentucky, and defendant, William Freeman, and his attorney, Scott Wendelsdorf, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the Superseding Indictment in this case with violations of 18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(c)(1)(A) and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 844. Defendant further acknowledges that the Superseding Indictment in this case seeks forfeiture of

> any and all property constituting, or derived from, proceeds said defendant obtained, directly or indirectly, as a result of the said

> offenses, and any and all of defendant's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the said violation alleged in Count 1 of the Superseding Indictment as well as all firearms and ammunition involved in the commission of the offense, including, but not limited to a Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621 and ammunition

pursuant to 18 U.S.C. § 924(d), 21 U.S.C. § 853 and 28 U.S.C. § 2461, by reason of the offenses charged in Counts 1, 3 and 4 of the Superseding Indictment.

2. Defendant has read the charges against him contained in the Superseding Indictment, and those charges have been fully explained to him by his attorney. Defendant fully understands the nature and elements of the crimes with which he has been charged.

3. Defendant will enter a voluntary plea of guilty to all charges in this case. Defendant will plead guilty because he is in fact guilty of the charges. The parties agree to the following factual basis for this plea:

> On or about September 14, 2004, a Louisville Metropolitan Police Department (LMPD) officer responded to a call that a robbery suspect had been identified at Vermont Liquors located at the corner of 34th and Vermont Streets in Louisville, Jefferson

County, Kentucky. Jefferson County lies within the Western District of Kentucky. The officer responded to the scene and recognized the defendant, **William Freeman**, from the robbery suspect description. The officer asked to speak with **Freeman** and told **Freeman** to put his hands on the vehicle. **Freeman** refused and attempted to flee on foot. The two engaged in a scuffle. A backup officer responded to the scene and Freeman was subdued. When the officers brought **Freeman** to his feet, they found a loaded Davis P-380 pistol and a bag of suspected marijuana on the ground where **Freeman** had been lying. During a search incident to arrest, the officers found approximately 3.42 grams of suspected cocaine base, commonly referred to as "crack cocaine" packaged for distribution, in **Freeman's** right pant pocket.

Prior to September 14, 2004, Freeman had been convicted of a crime for which he could be imprisoned for more than one year, that is, a felony. Specifically, on March 23, 2004, **Freeman** was convicted of two counts of Complicity to Wanton Endangerment in the First Degree, and Receiving Stolen Property over $300, in case number 03CR2500 in Jefferson Circuit Court, Louisville, Kentucky. The Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621 was manufactured outside the Commonwealth of Kentucky.

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4. Defendant understands that the charges to which he will plead guilty carry a minimum term of imprisonment of five years, a combined maximum term of imprisonment of life, a combined maximum fine of $1,501,000, and a three-year term of supervised release. Defendant understands that an additional term of imprisonment may be ordered if the terms of the supervised release are violated, as explained in 18 U.S.C. § 3583. Defendant understands that as a result of the charges to which he will plead guilty he will be ordered to forfeit

> any and all property constituting, or derived from, proceeds said defendant obtained, directly or indirectly, as a result of the said offenses, and any and all of defendant's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the said violation alleged in Count 1 of the Superseding Indictment as well as all firearms and ammunition involved in the commission of the offense, including, but not limited to a Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621 and ammunition.

5. Defendant understands that if a term of imprisonment of more than one year is imposed, the Sentencing Guidelines require a term of supervised release and that he will then be subject to certain conditions of release. §§5D1.1, 5D1.2, 5D1.3.

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6. Defendant understands that by pleading guilty, he surrenders certain rights set forth below. Defendant's attorney has explained those rights to him and the consequences of his waiver of those rights, including the following:

A. If defendant persists in a plea of not guilty to the charges against him, he has the right to a public and speedy trial. The trial could either be a jury trial or a trial by the judge sitting without a jury. If there is a jury trial, the jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent and that it could not convict him unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt.

B. At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

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C. At a trial, defendant would have a privilege against self-incrimination and he could decline to testify, without any inference of guilt being drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

7. Defendant understands that the United States Attorney's Office has an obligation to fully apprise the District Court and the United States Probation Office of all facts pertinent to the sentencing process, and to respond to all legal or factual inquiries that might arise either before, during, or after sentencing. Defendant admits all acts and essential elements of the Superseding Indictment counts to which he pleads guilty.

8. Defendant understands that he may be responsible for a fine, costs of prosecution, costs of incarceration and supervision which may be required. All financial matters are left to be addressed at sentencing.

9. Defendant acknowledges liability for the special assessment mandated by 18 U.S.C. § 3013 and will pay the assessment in the amount $400.00 to the United States District Court Clerk's Office on the date of sentencing.

10. At the time of sentencing, the United States will

-recommend a fine at the lowest end of the applicable Guideline Range, to be due and

payable on the date of sentencing.[1]

-recommend a reduction of 3 levels below the otherwise applicable Guideline for "acceptance of responsibility" as provided by §3E1.1(a) and (b), provided the defendant does not engage in future conduct which violates a condition of bond, constitutes obstruction of justice, or otherwise demonstrates a lack of acceptance of responsibility. Should such conduct occur and the United States, therefore, opposes the reduction for acceptance, this plea agreement remains binding and the defendant will not be allowed to withdraw his plea.

-stipulate that the quantity of drugs involved in this case is 3.4 grams of a mixture or substance containing cocaine base and 1.6 grams of marijuana.

-agree that a sentence of 106 months' incarceration is the appropriate disposition of this case.

-demand forfeiture of any and all property constituting, or derived from, proceeds said defendant obtained, directly or indirectly, as

[1] The defendant acknowledges that he has read the Notice and Penalty Pages attached to the Superseding Indictment/ Information, and that he understands the interest and penalty provisions applicable to the fine imposed and included in the Judgment entered by the Court, said Notice and Penalty Pages are incorporated herein by reference.

a result of the said offenses, and any and all of defendant's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the said violation alleged in Count 1 of the Superseding Indictment as well as all firearms and ammunition involved in the commission of the offense, including, but not limited to a Davis Industries, .380 caliber, P-380 pistol, bearing serial number AP102621 and ammunition.

11. Both parties have independently reviewed the Sentencing Guidelines applicable in this case, and in their best judgment and belief, conclude as follows:

A. The Applicable Offense Level should be determined as follows:

Base offense level:	22	USSG § 2D1.1 (drug quantity table)
	-3	USSG § 3E1.1(a) & (b)
Adjusted offense level	19	

**18 U.S.C. § 924(c) conviction carries 60-month sentence which must be served consecutively to any sentence for the underlying drug trafficking offense.

B. The Criminal History of defendant shall be determined upon completion of the

presentence investigation, pursuant to Fed. R. Crim. P. 32(c). Both parties reserve the right to object to the USSG §4A1.1 calculation of defendant's criminal history. ~~The parties agree to not seek a departure from the Criminal History Category pursuant to §4A1.3.~~ (SW JL) The parties anticipate a Criminal History Category of IV.

C. The foregoing statements of applicability of sections of the Sentencing Guidelines and the statement of facts are not binding upon the Court. The defendant understands the Court will independently calculate the Guidelines at sentencing and defendant may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application.

12. Defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines.

13. Defendant is aware of his right to appeal his conviction and that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The Defendant knowingly and voluntarily waives the right (a) to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742, and (b) to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or otherwise. Defendant understands and

agrees that nothing in this plea agreement should be construed as a waiver by the United States of its right to appeal the sentence under 18 U.S.C. § 3742.

14. Defendant agrees to make a full and complete disclosure of his assets and financial condition, and will complete the accompanying defendant's Affidavit, and will submit to an investigation by the Financial Litigation Unit of the United States Attorney's Office for the purpose of insuring prompt satisfaction of all fines, restitution, and special assessments resulting from his guilty plea.

15. This Agreement is entered into by the United States on the basis of the express representation of defendant that he is making a full and complete disclosure of all assets over which he exercises control.

16. Defendant agrees to the forfeiture of any interest he or his nominees may have in the following assets which he owns or over which he exercises control:

> any and all property constituting or derived from, proceeds said defendant obtained, directly or indirectly, as a result of the said offenses, and any and all of defendant's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the said violation alleged in Count 1 of the Superseding Indictment as well as all firearms and ammunition involved in the commission of the offense, including, but not

limited to a Davis Industries, .380 caliber P-380 pistol, bearing serial number AP102621 and ammunition

17. By this Agreement, defendant agrees to forfeit all interests in the properties listed in paragraph 16 above and to take whatever steps are necessary to pass clear title to the United States. These steps include but are not limited to surrender of title, the signing of a consent decree, a stipulation of facts regarding the transfer and basis for the forfeitures and signing any other documents necessary to effectuate such transfers.

18. Defendant agrees to a pre-plea investigation by the United States Marshal's Service for the purpose of assessing the value of each and every asset. Defendant agrees to undergo a full debriefing in order to accomplish this end.

19. Defendant agrees to waive any double jeopardy challenges that defendant may have to any administrative or civil forfeiture actions arising out of the course of conduct that provide the factual basis for this Superseding Indictment. Defendant further agrees to waive any double jeopardy challenges that defendant may have to the charges in this Superseding Indictment based upon any pending or completed administrative or civil forfeiture actions.

20. Defendant agrees not to pursue or initiate any civil claims or suits against the United States ofAmerica, its agencies or employees, whether or not presently

known to defendant, arising out of the investigation or prosecution of the offenses covered by this Agreement.

21. The defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 522a.

22. Defendant agrees to interpose no objection to the United States transferring evidence or providing information concerning defendant and this offense, to other state and federal agencies or other organizations, including, but not limited to the Internal Revenue Service, other law enforcement agencies, and any licensing and regulatory bodies, or to the entry of an order under Fed. R Crim. P. 6(e) authorizing transfer to the Examination Division of the Internal Revenue Service of defendant's documents, or documents of third persons, in possession of the Grand Jury, the United States Attorney, or the Criminal Investigation Division of the Internal Revenue Service.

23. If the Court refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed. R Crim. P. 11(e)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and defendant will be allowed to withdraw the plea of guilty.

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24. Defendant agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors. Defendant states that he has informed the United States Attorney's Office and the Probation Officer, either directly or through his attorney, of all mitigating factors. Defendant will not oppose imposition of a sentence incorporating the disposition provided for within this Agreement, nor argue for any other sentence. If Defendant argues for any sentence other than the one to which he has agreed, he is in breach of this Agreement. Defendant agrees that the remedy for this breach is that the United States is relieved of its obligations under this Agreement, but Defendant may not withdraw his guilty plea because of his breach.

25. This document states the complete and only Plea Agreement between the United States Attorney for the Western District of Kentucky and defendant in this case, and is binding only on the parties to this Agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have been or will be made to defendant in connection with this case, nor have any predictions or threats been made in connection with this plea.

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AGREED:

DAVID L. HUBER
United States Attorney

By:
/s/ Jo E. Lawless /date/ 4/18/05
Jo E. Lawless Date
Assistant United States Attorney

I have read this Agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it.

/s/ William Freeman /date/ 4-18-05
William Freeman Date
Defendant

I am the defendant's counsel. I have carefully reviewed every part of this Agreement with the defendant. To my knowledge my client's decision to enter into this Agreement is an informed and voluntary one.

/s/ Scott Wendelsdorf /date/ 3/15/05
Scott Wendelsdorf Date
Counsel for Defendant

DLH:JEL:050304

APPENDIX D — ORDER REGARDING GUILTY PLEA IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ENTERED ON APRIL 18, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA	PLAINTIFF
VS.	CRIMINAL ACTION NO.: 3:04CR-98-1-J
WILLIAM FREEMAN	DEFENDANT

ORDER

This case was called in open Court on April 18, 2005 for a Change of Plea.

APPEARANCES:

For the United States:	Ms. Jo E. Lawless, Assistant U.S. Attorney
For the Defendant:	Mr. Patrick Bouldin, Assistant Federal Public Defender
Court Reporter:	Ms. Carola Strijek

The defendant, WILLIAM FREEMAN, withdrew his previously-entered plea of NOT GUILTY and entered

a plea of GUILTY to the charges contained in the Superseding Indictment pursuant to a written Rule 11 (c)(1)(C) plea agreement.

After complying with Rule 11, Federal Rules of Criminal Procedure, as is disclosed by the records of the official court reporter, the Court accepted the defendant's plea of guilty.

IT IS ORDERED:

1) Sentencing proceedings will be conducted on **July 18, 2005 at 10:00 a.m.,** prevailing local time.

2) The probation officer, defendant and counsel shall promptly confer and establish a plan for compliance with Rule 32(c) of the Federal Rules of Criminal Procedure. In the event they fail to promptly agree on a plan, they shall immediately initiate a joint telephone conference with the Court to resolve their disagreement.

3) The jury trial of April 19, 2005 is REMANDED from the docket.

4) The defendant is remanded to the custody of the United States Marshal pending sentencing.

April 18, 2005

/s/ Edward H. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF CHANGE OF PLEA HEARING ON APRIL 18, 2005

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:04-CR-98

April 18, 2005

UNITED STATES OF AMERICA,

Plaintiff,

VS.

WILLIAM FREEMAN

Defendant.

TRANSCRIPT OF CHANGE OF PLEA HEARING BEFORE EDWARD JOHNSTONE UNITED STATES DISTRICT JUDGE

APPEARANCES:

For United States: JO LAWLESS, ESQ.
U.S. Attorney's Office
510 West Broadway
Louisville, KY 40202

Appendix E

For Defendant: PATRICK BOULDIN, ESQ.
Western Kentucky Federal
Community Defender, Inc.
629 S. 4th Avenue, #200
Louisville, KY 40202

[Defendant present.]

PROCEEDINGS

[2] THE CLERK: 3:04-CR-98, *United States of America versus William Freeman.* We're here for a change of plea, Your Honor.

* * * * *

[13] . . . Now, you have all these rights. The question is do you want to give them up and plead guilty?

THE DEFENDANT: Yes, Sir.

THE COURT: Do you want to do that?

THE DEFENDANT: Yes, Sir.

THE COURT: You don't want a trial by jury, you want -- you don't want any witnesses to appear against you and if you do this, I'm going to ask you what happened and you're going to have to tell me. So you'll be giving up your right against self-incrimination. Do you understand that?

THE DEFENDANT: Yes, sir.

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THE COURT: Still want to do it?

THE DEFENDANT: Yes, sir.

THE COURT: Now, let's talk about the penalties that can be imposed in this case. They're all rather complicated with regard to penalties now and the courts, themselves, cannot agree what the law is. We have a lot of argument one way or the other [14] from qualified people on both sides, but the statute sets what the penalties are or can be. Let's look at that just for a minute. Under the law under Count One of the indictment, the penalty can be no more than twenty years and/or a fine of not more than $1 million or both, and not less than three years supervised release after an original prison term is completed.

Count Two of the indictment can be no more than one year and not less than $1,000 fine or $1 million -- up to $1 million fine or both, but not more than one year of supervised release.

Count Three of the indictment says that the prison term should be no less than five years consecutive with the other counts and/or not more than $250,000 fine or both, or three years supervised release.

Now, Count Four of the indictment alleges that the penalties shall be not more than ten years, not more than $250,000 fine or both, with not more than supervised release. So the bottom line is you can receive those penalties, many of which must run concurrently with each other. Some of them are consecutive with the other charges contained in the indictment. Do you understand that?

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[15] THE DEFENDANT: Yes, sir.

THE COURT: And you understand that if you plead guilty, there is $100 assessment charge for each count of the indictment to which you plead guilty, which would make an assessment of not more than $600 in this case, because there are four counts.

Now, I gave you a wide range of prison terms that can be imposed. Back in 1984, they passed some legislation that was supposed to make sentencing more fair and equitable, reasonable. It was to carry out the purpose of punishment. That statute went well for a few years. It's called the Federal Sentencing Guidelines. But in recent times, the powers that be, the Supreme Court of the United States, looked at that law and interpreted it and applied new reasons.

So the Federal Guidelines now they tell us are advisory. That means that a judge who is imposing a penalty must follow those guidelines or be advised by those guidelines rather than follow them. Well, in order to follow them, the Court directs that the probation officer do a probation report. That probation report will tell the Court what your prior troubles have been, what judgments and criminal [16] efforts have been against you, and they'll assess your criminal history with some numbers. They'll put you in a category and then they will look at the present charges against you to which you plead guilty, and they will put an evaluation on the offenses you've committed to determine whether or not you were a leader; how much drug was involved. They will evaluate the offenses that

you've committed and they will correlate your criminal history value with your criminal history assessment, and it will give a range -- that will give a range of time and sentences that must be assessed for each count, and the Court must consider that range in an advisory capacity.

So we don't know today what penalties you can receive and we won't know until the presentence report is completed, until your lawyer has an opportunity to examine it and the Government lawyer has an opportunity to examine it, and we may have to have a mini trial to find out what the guideline range really is. But that's about as much as we know with certainty as to the maximum or minimum penalty which will be imposed on the criminal counts against you. I ask you if you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're a wise man, because I'm [17] fearful if I ask the lawyers in this case if they understood it, they say, yes, I'd have to question it because they don't know what the Court of Appeals did this morning, but we've told you the best we can. All right?

THE DEFENDANT: Yes, sir.

THE COURT: Then you've given up your constitutional right and you're competent to plead and you know what the maximum and minimum sentences can be and you know about these other things. So I'm going to have the United States Attorney summarize the plea agreement which you entered into. I want you

to listen carefully to it and I'm going to ask you when it's over whether that is your plea agreement or if that is the substance of it. Would you listen to her and she will outline.

MS. LAWLESS: Your Honor, the United States and Mr. Freeman have entered into this plea agreement pursuant to Federal Rules of Criminal Procedure 11(c)(1)(C), and that's important to note because the parties have reviewed the sentencing guidelines as well as the statutory minimums that are at play in this issue, and we have agreed upon a recommended sentence that we will jointly provide to the Court. And if the Court chooses not to accept our plea [18] agreement or not to sentence within our agreement, then Mr. Freeman will have an opportunity to withdraw his guilty plea and go to trial at that time.

In exchange for Mr. Freeman's admissions of guilt to the charges that are contained in the indictment, he is also agreeing to forfeit the firearms and ammunition that the Court has identified before that's been set out in the superseding indictment. There's a factual basis that the parties agree to and that's set out in numbered paragraph 3 on page 2 of the plea agreement, and basically goes through the events that led to Mr. Freeman's arrest in this case and the charges that have been brought against him by the federal grand jury.

The plea agreement also sets out, as the Court has already done with the terms, mandatory minimum terms of imprisonment, the maximum penalty that he faces, including financial penalties and other matters.

He's stating that he understands that there is a provision for supervised release that would be imposed after he serves any sentence that the Court imposes upon him. He's acknowledged the rights that the Court has gone over with him this morning; that he may be responsible for fine, costs of prosecution, or cost of incarceration and [19] supervision, but that all the financial matters are going to be left to the discretion of the Court after the probation office has had an opportunity to prepare and present to the Court the presentence report in this case.

One thing I would like to point out is that there are four criminal charges and two forfeiture counts, so the special penalty assessment assessment that Mr. Freeman would face is $400, rather than $600, because there can't be a special penalty assessment for the forfeiture counts.

At the time of sentencing, assuming that this Court accepts the plea agreement that the parties have entered into, the United States will recommend a fine at the lowest end of the applicable guideline range to be due and payable on the date of sentencing. And, again, that's all premised on a determination of his ability to pay.

We would recommend the reduction of three levels below the otherwise applicable guideline range for acceptance of responsibility, and in that there is one caveat to that, that Mr. Freeman not engage in any criminal conduct or anything that would violate his supervision, which, actually, he's incorporated. So assuming he doesn't get in trouble while he's in [20] jail, there shouldn't be a problem with that.

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The parties are going to stipulate and the United States agrees that the quantity of drugs involved in this case is 3.4 grams of mixture or substance containing cocaine base, commonly referred to as crack cocaine, and 1.6 grams of marijuana. And we will agree that a sentence of 106 months incarceration is the appropriate disposition of this case.

The parties have reviewed the sentencing guidelines and we have set out our best judgment and belief how they apply in this case, and that's in numbered paragraph 11 of the plea agreement. It is important to note that Mr. Freeman is pleading guilty to what we call a 924 (C) conviction, which is using or carrying or possessing a firearm in furtherance of a drug trafficking offense, so there's a five year mandatory minimum that has to be served consecutively to any sentence that the Court imposes to the drug trafficking offense.

We believe that his criminal history category is a 4. There may be some issues with that and you'll see, Judge, and Mr. Freeman should know about this. And Mr. Wendelsdorf and I both have blacked out one sentence that was previously in the [21] plea agreement, and it's number paragraph 11, capital B. And we both initialed that in the one that the Court has so that if there's an issue that arises with regard to Freeman's criminal history, Mr. Freeman's attorney will have an opportunity to argue to the Court that his criminal history ought to be 4, regardless how that carries out, but we believe it will turn out to be a 4.

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Mr. Freeman is agreeing to have his sentence determined to the Federal Sentencing Guidelines, as this Court commented earlier, he is waiving his right to a direct appeal and to attack it later on. He agrees to make a full disclosure of his assets, because he is looking at some forfeiture allegations. And he is agreeing that the disposition that's provided for in this agreement is fair taking into account all of the aggravating and mitigating factors. We're all aware of this is the only agreement between the parties. Any other discussions we may have had before are null and void and everything -- all the promises and consideration are set out in this particular plea agreement, and that we will jointly recommend to the Court that he serve a sentence of 108 -- I'm sorry, Your Honor, 106 months. I stand corrected. I apologize.

[22] THE COURT: Is that your understanding, Mr. Bouldin?

MR. BOULDIN: It is, Your Honor, 106 months under the plea agreement and the other terms Ms. Lawless outlined, that's correct.

THE COURT: Is that your understanding, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. Now, how do you plead to that?

THE DEFENDANT: Guilty.

* * * * *

APPENDIX F — TRANSCRIPT OF SENTENCING HEARING ON JULY 18, 2005

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:04-CR-98-J

July 18, 2005
Louisville, Kentucky

UNITED STATES OF AMERICA,

Plaintiff,

VS.

WILLIAM FREEMAN,

Defendant.

****

TRANSCRIPT OF SENTENCING HEARING
BEFORE HONORABLE EDWARD H. JOHNSTONE
UNITED STATES SENIOR DISTRICT JUDGE

****

Appendix F

APPEARANCES:

For United States: Jo E. Lawless
U.S. Attorney's Office
510 West Broadway
Louisville, KY 40202

For Defendant: Scott T. Wendelsdorf
Western Kentucky Federal
Community Defender, Inc.
629 S. 4th Avenue, Suite 200
Louisville, KY 40202

[Defendant present.]

Dena Legg, CCR, RPR, CRR
Official Court Reporter
221 U.S. Courthouse
Louisville, KY 40202
(502) 625-3778

Proceedings recorded by mechanical stenography, transcript produced by computer.

[2] (Begin proceedings in open court at 10:12 a.m.)

THE COURT: Call the case.

DEPUTY CLERK: 3:04-CR-98-J, *United States of America v. William Freeman*. We're here for sentencing, Your Honor.

Appendix F

MS. LAWLESS: Good morning, Your Honor. Jo Lawless on behalf of the United States.

MR. WENDELSDORF: Scott Wendelsdorf for the defendant, who is in custody and present, Your Honor.

We acknowledge receipt of a copy of the presentence report in this matter. We have no objections. This is a (C) plea where both the United States and the defense have agreed that a sentence of 106 months would be appropriate. This is within the guideline, the advisory guideline range calculated by the probation officer. The parties would ask the Court to accept the plea agreement.

THE COURT: That would be 106 months?

MR. WENDELSDORF: That's correct, Your Honor. That's the agreement of the parties.

THE COURT: Very well. The Court will adopt the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein.

Anything further, Mr. Freeman, before --

MR. WENDELSDORF: Mr. Freeman, do you want to say anything to the judge before he enters the sentence? You don't have to, but this is an opportunity you have.

[3] THE DEFENDANT: No, I ain't going to say nothing.

Appendix F

MR. WENDELSDORF: Nothing, Your Honor.

THE COURT: All right. The Court, having considered the advisory guidelines and 18 USC 3553(a), imposes the following sentence:

It is the judgment of the Court that you be committed to the custody of Bureau of Prisons for a term of 46 months as to each of Counts 1 and 4 in the superseding indictment, and 12 months as to Count 2, to be served concurrently, each with the other, and 60 months as to Count 3, which shall be served consecutively to the terms imposed in Counts 1, 2, and 4, for a total term of 106 months.

Upon release from imprisonment, you're placed on supervised release for a term of three years as to Counts 1 and 4, and a term of one year as to Count 2, and a term of five years as to Count 3, which will run consecutive for a term of five years.

Defendant shall abide by the standard conditions of supervision adopted by the Court, as well as the special conditions to include drug aftercare, which will be explained by the probation officer.

The justification for the guideline are -- before that, you'll pay a special penalty assessment fee of $100 as to each count of the conviction, for a total special penalty assessment of $400. Restitution is not an issue in this case. Fine and costs of incarceration are waived due to your inability to pay.

[4] Upon motion of the United States just heard, the indictment is dismissed -- the remainder of the indictment is -- the original indictment is dismissed as to the defendant.

The guideline range is as follows:

There's a total of 19 Criminal History Category -- the total offense level is 19 under the Criminal History Category of IV, advisory guideline range of 46 to 57 months, plus 60 months consecutive as required by the statute, a fine of 7,500 to $1 million and three years -- at least three years supervised release.

The Court believes the sentence imposed, followed by five years supervised release, fall within the guideline ranges and are sufficient to meet the objectives of the law.

Any special --

MR. WENDELSDORF: No, Your Honor. The defendant waived his appellate rights in the plea agreement, Your Honor.

THE COURT: All right. Any -- as far as place of service of sentence, leave it to --

MR. WENDELSDORF: Just as close as possible to his home, Your Honor, but I believe the Bureau of Prisons will probably do that anyway.

THE COURT: All right. The Court recommends service of the sentence in the proximity of Louisville, Kentucky.

MR. WENDELSDORF: Thank you, Judge.

PROBATION OFFICER: Your Honor --

[5] THE COURT: You may appeal from this sentence by filing a notice of appeal at any time within seven days from -- ten days from today.

PROBATION OFFICER: Your Honor, I believe -- those terms of supervised release, I believe you meant to say to run concurrently with each other, rather than consecutively, of five years.

THE COURT: Any objection? So ordered.

MR. WENDELSDORF: Thank you, Judge.

MS. LAWLESS: Your Honor, there is one other matter. There's a forfeiture matter in this case. You've already entered a preliminary order of forfeiture, and Mr. Freeman has agreed to forfeit the gun and ammunition --

MR. WENDELSDORF: That's correct.

MS. LAWLESS: -- but I do think that has to be reflected in the judgment that there is a forfeiture.

Even though he does not have the ability to pay, if

the Court mentioned the special assessment penalty, I didn't hear it.

MR. WENDELSDORF: Yes, he did.

MS. LAWLESS: He did? I'm sorry. I did not hear it.

MR. WENDELSDORF: He did.

THE COURT: Very well.

MS. LAWLESS: Okay. Thank you.

THE COURT: So ordered.

[6] MR. WENDELSDORF: Thank you, Judge.

THE COURT: That concludes this matter.

(Proceedings concluded at 10:17 a.m.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/Dena Legg _____
Certified Court Reporter
No. 20042A157
Official Court Reporter

November 19, 2010
Date

APPENDIX G — JUDGMENT AND COMMITMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ENTERED ON JULY 19, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA

v.

WILLIAM FREEMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:04CR98-1-J
Counsel For Defendant: **Scott Wendelsdorf, Federal Public Defender**
Counsel For The United States: **Jo E. Lawless, Asst. U.S. Atty.**
Court Reporter: **Dena Legg**

THE DEFENDANT:

[x] **pursuant to a Rule ii(c)(1)(C) plea agreement**

[x] pleaded guilty to counts 1, 2, 3 and 4 of the Superseding Indictment, knowingly, willingly and voluntarily on **April 18, 2005**.

Appendix G

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 7 Of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[x] **The original Indictment is dismissed on the motion of the United States.**

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

IT IS FURTHER ORDERED that the presentence report be returned to the United States Probation Office, and shall be available to counsel on appeal. **IT IS FURTHER ORDERED** that the sentencing

recommendation be returned to the United States Probation Office, and shall not be available to counsel on appeal.

July 18, 2005
Date of Imposition of Judgment

/s/ Edward H. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

Appendix G

DEFENDANT: FREEMAN, WILLIAM
CASE NUMBER: 3:04CR98-1-J

COUNTS OF CONVICTION

	Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count
21	USC 841(a)(1) and 841(b)(1)(C)	POSSESS WITH INTENT TO DISTRIBUTE "CRACK" COCAINE	09/14/2004	1
21	USC 844	MARIJUANA POSSESSION	09/14/2004	2
18	USC 924(c)(1)(A)	POSSESS FIREARM IN FURTHERANCE OF DRUG-TRAFFICKING CRIME	09/14/2004	3
18	USC 922(g)(1) and 924(a)(2)	POSSESSION OF FIREARM BY CONVICTED FELON	09/14/2004	4

Appendix G

DEFENDANT: **FREEMAN, WILLIAM**
CASE NUMBER: **3:04CR98-1-J**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **46 MONTHS** as to each of Counts 1 and 4 of the Superseding Indictment and **12 MONTHS** as to Count 2, to be served concurrently with each other; and **60 MONTHS** as to Count 3 of the Superseding Indictment, which shall be served consecutively to the terms imposed on Counts 1, 2 and 4, for a total term of imprisonment of **106 MONTHS**.

[x] **The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that the Bureau of Prisons designate an institution in close proximity to Louisville, Kentucky.**

[x] **The defendant is remanded to the custody of the United States Marshal.**

Appendix G

DEFENDANT: **FREEMAN, WILLIAM**
CASE NUMBER: **3:04CR98-1-J**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE YEARS** as to Counts 1 and 4, **ONE YEAR** as to Count 2, and **FIVE YEARS** as to Count 3 of the Superseding Indictment, which shall run concurrently for a total term of supervised release of **FIVE YEARS**.

The defendant shall report to the probation office in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

[x] **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

[x] **The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

* * *

Appendix G

DEFENDANT: **FREEMAN, WILLIAM**
CASE NUMBER: **3:04CR98-1-J**

ADDITIONAL SUPERVISED RELEASE TERMS

(14) The defendant shall participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug or alcohol dependency, which will include testing for the detection of substance use or abuse.

Appendix G

DEFENDANT: **FREEMAN, WILLIAM**
CASE NUMBER: **3:04CR98-1-J**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 400.00**	**$0**	**$0**

[x] **The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.**

[ ] The determination of restitution is deferred until . *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

[x] **Restitution is not an issue in this case.**

* * * *

APPENDIX H — ORDER APPOINTING COUNSEL AND REQUIRING UNITED STATES PROBATION OFFICE TO FILE A MEMORANDUM OF RECALCULATION (MOR) ENTERED BY THE UNITED STATES DISTRICT COURT ON JUNE 9, 2008,

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE
CRIMINAL ACTION NO. 3:04CR-98-J

UNITED STATES OF AMERICA

PLAINTIFF

v.

WILLIAM FREEMAN

DEFENDANT

ORDER

Pursuant to 18 U.S.C. § 3582(c)(2), the guidance provided in Section 1B1.10 of the United States Sentencing Guidelines, and General Order No. 2008-01,[1] **IT IS ORDERED** as follows:

---

[1] Effective November 1, 2007, the United States Sentencing Commission amended the Drug Quantity Table at Section 2D1.1 so that crack cocaine quantities were generally lowered by two levels. Subsequently, the Sentencing Commission amended Section 1B1.10 to make the crack cocaine amendment retroactive, effective March 3, 2008. On April 16, 2008, the United States Sentencing Commission promulgated Amendment 715 to the United States (Cont'd)

Appendix II

1) Having determined that Defendant is financially unable to secure the services of an attorney, effective **May 22, 2008, Scott Thomas Wendelsdorf** is appointed to represent Defendant pursuant to 18 U.S.C. § 3006A(b).

2) The Clerk of Court is **DIRECTED** to **FILE UNDER SEAL** the United States Probation Office's Memorandum of Recalculation and all of its attachments in the above-referenced criminal action;

3) The Clerk of Court is **DIRECTED** to serve defense counsel and the United States Attorney with a copy of the Memorandum of Recalculation and all of its attachments;

4) The Clerk of Court is **DIRECTED** to serve Defendant with a copy of:

a) The Memorandum of Recalculation;
b) The Presentence Report; and
c) The Judgment and Commitment.

(Cont'd)

Sentencing Guidelines. *See www.ussc.gov.* Amendment 715 modifies the commentary to § 2D1.1 to revise the manner in which combined offense levels are determined in cases involving crack cocaine and one or more other controlled substances. *Id.* The new amendment additionally expands the listing in §1B1.10(c) to include Amendment 715 as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u). Pursuant to General Order No. 2008-01, this Court has established a procedure to review sentences of currently incarcerated individuals, like Defendant, that may be subject to a sentence reduction in accordance with the recent amendments.

5) **Within 30 days of the receipt of this Order, the parties must file any objections to the United States Probation Office's Memorandum of Recalculation and/or request a hearing. All objections are to be filed *conventionally under seal* with the Clerk's Office.** If no objections are filed, the Court will enter an appropriate order.

6) The Clerk of Court is **DIRECTED** to return the Memorandum of Recalculation and all of its attachments to the United States Probation Office after entry of an order on the recalculation of sentence.

Date: June 5, 2008

/s/ Edward H. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

cc: Counsel for Defendant Freeman (Scott Thomas Wendelsdorf)
United States Attorney
Defendant William Freeman
4408.009

APPENDIX I — ORDER REQUIRING UNITED STATES PROBATION OFFICE TO FILE A REVISED MEMORANDUM OF RECALCULATION (MOR) ENTERED BY THE UNITED STATES DISTRICT COURT ON AUGUST 28, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CRIMINAL ACTION NO. 3:04CR-98-J-1

UNITED STATES OF AMERICA

PLAINTIFF

v.

WILLIAM FREEMAN

DEFENDANT

ORDER

On June 9, 2008, pursuant to 18 U.S.C. § 3582(c)(2), the guidance provided in Section 1B1.10 of the United States Sentencing Guidelines, and General Order No. 2008-01, the Court entered an Order directing the Clerk of Court to file and serve a Memorandum of Recalculation and its attachments on the parties for the purposes of determining whether Defendant is eligible for a reduction in sentence due to the retroactive application of the crack cocaine amendment to the sentencing guidelines. Defendant also was appointed counsel, Scott Wendelsdorf, to represent him in connection with these proceedings. The parties

were given 30 days to file objections to the Memorandum of Recalculation with the Court. Defendant timely filed a notice of no objection.

However, it has come to the Court's attention that the plea in this case was entered pursuant to Fed. R. Crim. P.11(c)(1)(C). In light of this fact, the United States Probation Office has prepared and provided the Court with a Revised Memorandum of Recalculation. *See United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004) (holding that a district court cannot modify a sentence pursuant to 18 U.S.C. § 3582 where defendant entered a Rule 11(c)(1)(C) plea agreement even though defendant's sentencing range would have been lowered pursuant to a retroactive agreement to the Sentencing Guidelines). Accordingly,

IT IS ORDERED as follows:

1) The Clerk of Court is **DIRECTED** to **FILE UNDER SEAL** the United States Probation Office's Revised Memorandum of Recalculation;

2) The Clerk of Court is **DIRECTED** to serve Defendant, defense counsel, and the United States Attorney with a copy of the Revised Memorandum of Recalculation;

3) **Within 30 days of the receipt of this Order, the parties must file any objections to the United States Probation Office's Revised Memorandum of Recalculation and/or request a hearing. All objections are to be filed *conventionally under seal* with the Clerk's**

Office. If no objection is filed, the Court will enter an appropriate Order.

4) The Clerk of Court is **DIRECTED** to return both the Memorandum of Recalculation and all of its attachments and the Revised Memorandum of Recalculation to the United States Probation Office after entry of an order on the recalculation of sentence.

Date: August 27, 2008

/s/ Edward H. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

cc: Counsel of Record for Defendant William Freeman
(Scott Wendelsdorf)
United States Attorney
Defendant William Freeman

4408.009

APPENDIX J — MEMORANDUM OPINION AND ORDER DENYING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. §3582(c)(2) ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ON DECEMBER 31, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CRIMINAL ACTION NO. 3:04CR98-J

UNITED STATES OF AMERICA

PLAINTIFF

v.

WILLIAM FREEMAN

DEFENDANT

MEMORANDUM OPINION AND ORDER DENYING MOTION TO REDUCE SENTENCE AND OVERRULING DEFENDANT'S OBJECTIONS TO REVISED SENTENCING MEMORANDUM

This matter is before the Court on defendant William Freeman's Motion for Retroactive Application of Sentencing Guidelines to Crack Cocaine Offense (DN 41) and Objections to Revised Memorandum of Calculation (DN 47). The United States has filed a response asking that the Court decline to reduce defendant's sentence (DN

50). Defendant seeks reduction of his sentence under 18 U.S.C. §3582(c)(2) based on Amendment 706 to the United States Sentencing Guidelines, which reduces the base offense level for cocaine base offenses. For the reasons set forth below, the Court denies defendant's Motion and Objections to the Revised Sentencing Memorandum.

PROCEDURAL BACKGROUND

Pursuant to the procedure established by this District's General Order No. 2008-01, the United States Probation Office filed a Memorandum of Recalculation in which it recommended a reduction of sentence pursuant to the crack cocaine sentencing amendments. Neither the United States nor the defendant objected. However, during the interim period, the Court determined that the sentence imposed in this case was pursuant to an agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, and that there existed case law which would prohibit the Court from revisiting the sentence. At the Court's request, the United States Probation Office issued a revised Memorandum of Recalculation, so that the parties would have an opportunity to file objections.

HISTORY

Defendant pleaded guilty to possession of cocaine base with intent to distribute in violation of 18 U.S.C. §841(a)(1), misdemeanor possession of marijuana in violation of 18 U.S.C. §844, possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c), and being a felon in possession of a firearm in violation

of 18 U.S.C. §922(g)(1). The plea was made pursuant to an agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (hereinafter "Rule 11 C Plea") in which the parties stipulated to the quantities of drugs and agreed that a total sentence of 106 months – at the bottom of the applicable sentencing guideline range – was appropriate.

In 2007, the United States Sentencing Commission issued Amendment 706, lowering the base offense level for cocaine base offenses under U.S.S.G. §2D1.1, and applied the amendment retroactively. Defendant now asks the Court to modify his sentence in light of Amendment 706.

ANALYSIS

Defendant asks the Court to modify his term of imprisonment pursuant to 18 U.S.C. §3582(c)(2) and Amendment 706 (as amended by 715) to the Sentencing Guidelines. Section 3582(c) of Title 18 permits the Court to modify an imposed term of imprisonment in limited circumstances, such as when the term of imprisonment was based on a guidelines range that has subsequently been lowered by the Sentencing Commission. Amendment 706 lowers the base offense levels applicable to crack cocaine offenses, but it does not apply in every case.

In defendant's case, his sentence was not based upon a guidelines calculation, but rather the 106 months was agreed upon by the parties pursuant to Rule 11(c)(1)(C). The Sixth Circuit has determined that retroactive amendments to the sentencing guidelines provide legally

insufficient basis on which to modify a sentence under a Rule 11 C Plea, stating that such an agreement "binds both the parties and the court." *U.S. v. Peveler*, 359 F.3d 369, 378 (6th Cir. 2004). While this Court is not completely persuaded by this position, it is the prevailing law in the Sixth Circuit. Accordingly, Amendment 706 has no effect on defendant's sentence. The Court cannot reduce his sentence pursuant to 18 U.S.C. §3582 and Amendment 706. (See also *United States v. Trujeque*, 100 F.3d 869, 871 (10th Cir. 1996) holding that a sentence imposed under Rule 11(e)(1)(C) is not subject to a reduction under 18 U.S.C. §3582(c)(2) because it was not based on a sentencing range subsequently lowered by the Sentencing Commission.) Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Retroactive Application of Sentencing Guidelines to Crack Cocaine Offense (DN 41) is DENIED and the Objections to Revised Memorandum of Calculation (DN 47) are OVERRULED.

This is a final and appealable Memorandum Opinion and Order, and there is no just cause for delay.

/s/
Edward H. Johnstone, Senior Judge
United States District Court

APPENDIX K — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT RENDERED ON NOVEMBER 20, 2009

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 09a0748n.06

Nos. 08-6374, 09-5047

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO GOINS; WILLIAM FREEMAN,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF KENTUCKY

FILED
NOV 20, 2009
LEONARD GREEN, Clerk

Appendix K

BEFORE: BOGGS, ROGERS, and WHITE, Circuit Judges.

ROGERS, Circuit Judge. In these consolidated cases, two criminal defendants seek to have their sentences reduced based on the more lenient treatment that the Sentencing Guidelines now afford to crack offenders. In each case, the defendant pled guilty pursuant to an agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which rule binds the court to the sentence described in the agreement if the court accepts the plea. Under *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004), neither defendant is entitled to relief.

In November 2005, Antonio Goins was indicted for two counts of crack possession, one count of cocaine possession, and two counts of weapon possession. He entered a plea agreement with the Government pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). According to the terms of the agreement, Goins would plead guilty to the drug counts and one of the weapon counts, and the Government would move to dismiss the other weapon count. The agreement specified that the Government would agree to a sentence of fourteen years of imprisonment. The agreement also went on to discuss the applicability of the Guidelines and to specify how the various provisions would apply to Goins. The parties specified the exact quantity of crack and powder for which Goins would be held responsible and spelled out exactly how those amounts would result in a base offense level of 30. The parties agreed that Goins would receive a three-level reduction for acceptance of responsibility and would not

receive a two-level increase for possession of a dangerous weapon. The parties also agreed that Goins was subject to a five-year mandatory minimum consecutive sentence for the remaining weapon offense. The agreement did not specify Goins's criminal history category, and the parties reserved the right to object to the court's determination of that category but agreed not to seek a departure under U.S.S.G. § 4A1.3 from that determination. The agreement also specified, consistent with the provisions of Rule 11(c)(1)(C), that if the court did not accept and comply with the terms of the agreement the agreement would be null and void and Goins could withdraw his plea of guilty.

Consistent with the agreement, the court sentenced Goins to a fourteen-year term of imprisonment. Because the court assigned Goins a criminal history category of II, the fourteen-year term exceeded the recommended Guidelines range by eleven months.

In January 2005, William Freeman was charged in a superseding indictment with one count of crack possession, one count of marijuana possession, and two counts of weapon possession. Like Goins, Freeman entered a plea agreement pursuant to Rule 11(c)(1)(C). The terms required Freeman to plead guilty to all the counts in the superseding indictment and the Government to agree to a sentence of 106 months. Like Goins's agreement, Freeman's agreement specified the exact quantities of drugs for which he was accountable and that he would receive a three-level reduction for acceptance of responsibility. The agreement specified that Freeman's offense level after the three-level reduction would be

19 and that his criminal history category would be determined by the court, although the parties anticipated that Freeman's criminal history category would be IV. Like Goins's agreement, the agreement also specified that if the court did not accept and comply with the terms of the agreement, the agreement would be null and void and Freeman could withdraw his plea of guilty. Consistent with the agreement, the court sentenced Freeman to 106 months in prison.

After entry of both sentences, the Sentencing Commission amended the Guidelines to reduce the disparity in the treatment of crack and powder cocaine and made the amendment retroactive. *See* U.S.S.G. Appx. C, Amend. 706, *id.* § 1B1.10. Goins and Freeman sought to have their sentences reduced. In each case, the district court held that this circuit's precedent in *United States v. Peveler* precluded modification of a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. In Goins's case, the court added that the original sentence remained "sufficient but not greater than necessary to satisfy the purposes of sentencing." In Freeman's case, the court expressed ambivalence about the reasoning of Peveler but acknowledged it as binding precedent. Both defendants appealed.

The court's holding in *Peveler* precludes resentencing in each defendant's case. In *Peveler*, we held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement. 359

F.3d at 379. Although *Peveler's* holding does not preclude reducing the sentence of a defendant who pled under Rule 11(c)(1)(C) where resentencing is necessary to avoid a miscarriage of justice, *see* 359 F.3d at 379 n.4, neither Goins nor Freeman falls within that exception.

Goins is not entitled to resentencing because the district court specifically reiterated the appropriateness of Goins's sentence in light of the amendment to the Guidelines. Due to some uncertainty about which criminal history category the court would assign, Goins's agreed-upon sentence ultimately exceeded the high end of the Guidelines range applicable at the time Goins was sentenced. Given a criminal history category of II, Goins's advisory range was 78 to 97 months, to run consecutively with a 60-month mandatory minimum sentence for possession of a firearm in furtherance of a drug trafficking crime. This resulted in a total Guidelines range of 138 to 157 months, below the agreed-upon 168 months. The amendment to the Guidelines reduced the advisory portion of the sentence to 63 to 78 months, resulting in a total range of 123 to 138 months. Goins's 14-year (168 month) sentence therefore exceeds the high end of the amended range by 30 months instead of 11. This disparity, however, does not by itself constitute a miscarriage of justice. In pleading guilty, Goins entered into a carefully constructed agreement in which the parties balanced many factors—including the charges to which Goins would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which Goins would be held responsible. Having carefully bargained to reach this sentence, the parties acted under Rule 11(c)(1)(C) in order

to restrict the ability of the court to upset the negotiated balance. Nothing in this record suggests that declining to resentence Goins works any injustice. The district court did not err by holding Goins to the bargain he made. *Peveler*, 359 F.3d at 373.

Freeman also does not qualify for an exception under *Peveler*, but for different reasons. Unlike the court that considered Goins's motion for resentencing, the court considered Freeman's motion did not reiterate the appropriateness of Freeman's sentence. To the contrary, the court indicated that it felt constrained to deny Freeman's motion. However, the district court did not indicate that failing to resentence Freeman resulted in a miscarriage of justice. Indeed, *Peveler* would not have supported such a conclusion. Like the defendant in Peveler, Freeman's original 106- month sentence remained inside the Guidelines range for his crime, even after the amendment. *See id.* at 379 n.4. At the time Freeman was sentenced, the Guidelines called for a sentence of 46 to 57 months, to run consecutively with a 60-month mandatory minimum sentence for possession of a firearm in furtherance of a drug trafficking crime, for a total of 106 to 117 months. Under the amended Guidelines, the range was 37 to 46 months, also to run consecutively with the 60-month sentence, for a total of 97 to 106 months. Freeman's 106-month sentence therefore fell at the bottom of the range before the amendment and at the top of the range after the amendment, a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing. *See id.* ("We note, however, that with the two-level deduction sought,

Peveler's actual sentence is within the revised sentencing guideline range although the sentence is not at the low end of the revised guideline range as provided in the plea agreement.").

For the foregoing reasons, the orders denying resentencing are AFFIRMED.

WHITE, Circuit Judge, concurring. I agree that affirmance is mandated by our decision in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004), and thus concur. I write separately because I believe Peveler construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended.

Peveler's, and Goins' and Freeman's, sentence modification requests are based on 18 U.S.C. § 3582(c)(2), which provides:

> The court may not modify a term of imprisonment once it has been imposed except ... in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant ... after considering the factors set forth in section 3553(a) ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3553(a) lists the following factors to be considered when imposing sentence:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

* * *

(5) any pertinent policy statement --

(A) issued by the Sentencing Commission ...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; . . . .

United States Sentencing Commission Policy statement U.S.S.G. §1B1.10 addresses §3582(c)(2) motions, stating:

Appendix K

a) Authority.--

(1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.--A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if--

(A) None of the amendments listed in subsection (c) is applicable to the defendant; or

(B) An amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

> (3) Limitation.--Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.--

> (1) In General.--In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

Following the Tenth Circuit's decision in *United States v. Trujeque*, 100 F.3d 869 (10th Cir. 1996), which also involved a plea taken under Rule 11, the *Peveler* court explained:

> The Tenth Circuit then ruled that the defendant's sentence was not actually calculated under the guidelines, but was determined by the Rule 11(e)(1)(C) plea agreement. *Id.* at 871. Thus, this retroactive amendment could not have affected the original sentence, and the Tenth Circuit directed a dismissal of the motion to modify. *Id.* Similarly, Peveler was sentenced pursuant to a Rule 11(e)(1)(C) plea agreement that binds both the parties and the court. The fact that the parties in this case specified an offense level under the sentencing guidelines rather than a fixed period of imprisonment like the parties in *Trujeque* is a distinction without a difference in terms of the court lacking the power to amend the plea agreement.

[*Peveler*, 359 F.3d at 378.] Like the Tenth Circuit, the *Peveler* court emphasized the binding nature of Rule 11(c)(1)(C) sentence agreements once the plea is accepted by the court:

> Thus, absent an agreement of the parties, the plain language of the current version of Rule 11(e)(1)(C), now Rule 11(c)(1)(C), generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582(C). This conclusion applies despite the retroactivity of a subsequent amendment to

> a relevant guideline utilized to determine the defendant's sentence.

[359 F.3d at 378-79.][1]

There is indeed a tension between the various provisions bearing on the question. Sentences imposed

---

[1] The relevant provision states:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> > (A) not bring, or will move to dismiss, other charges;
> >
> > * * *
> >
> > (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1)(C).

pursuant to Rule 11(c)(1) agreements are different in that usually the defendant has received concessions in exchange for a plea of guilty or nolo contendere. These concessions may include the dismissal of charges, or charge reductions that affect the applicable Guidelines range. In such cases, the government may have made the concessions relying, at least in part, on the knowledge that the defendant will be sentenced to a certain minimum term. On the other hand, Rule 11(c)(1) negotiations and the resulting agreements are informed and shaped by the existing Guidelines. The parties evaluate their gains and concessions using the Guidelines as their yardstick.

With this context in mind, I look to the language of 18 U.S.C. § 3582(c)(2). The statute authorizes a modification of sentence where the defendant has been sentenced to a term of imprisonment "*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." [Emphasis added.] The *Peveler* court concluded that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement is based on the agreement, not the Guidelines, and thus is not encompassed by the statute. This is an overly narrow interpretation of the statute.

The statute does not address the issue directly; although it lists certain exceptions, a sentence imposed pursuant to a plea agreement is not one of them. The statutory language – "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered" – can be fairly understood to support either result. One can say that a Rule 11(c)(1)(C) sentence is based on the plea agreement, not the Guidelines; or one can say

that the sentence is imposed pursuant to the agreement but is based on many factors, including the agreement and the Guidelines.

Nothing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements. Congress obligated the Sentencing Commission to review and revise the Guidelines periodically, 28 U.S.C. 994(o), and gave the courts explicit authority to amend sentences that were based on Guideline ranges that were subsequently lowered by the Commission, provided the sentence reduction is consistent with policy statements issued by the Commission. Acting under Congressional authority, the Sentencing Commission has determined that certain amendments to the Guidelines, including the revision to the 100-to-1 powder/crack cocaine ratio, should be applied retroactively, so that sentences based on Guidelines and ranges that have subsequently been reevaluated and rejected in favor of new Guidelines and ranges can be adjusted if necessary to achieve the goals of sentencing as expressed by Congress in § 3553(a). Given that Rule 11(c)(1)(C) sentences are negotiated in the context of the same Guidelines as non-negotiated sentences, and are affected by the same Guidelines later rejected and amended by the Commission, there is no reason to believe Congress intended to single these sentences out and deny § 3582(c)(2) relief to defendants who pleaded guilty pursuant to Rule 11(c)(1)(C) agreements. The essential feature of these sentences is the same whether imposed solely in the exercise of the court's discretion, or based

on a Rule 11(c)(1)(C) agreement – the sentences are based on a Guidelines range that was subsequently lowered by the Commission under circumstances that led the Commission to determine that a reduced sentence might be appropriate.

Peveler, and the cases on which it relies, hold that a district court is without authority to modify a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement.[2] But a

---

[2] I observe that the language of the application note to U.S.S.G. § 1B1.10 found significant by the *Peveler* Court has been amended. When *Peveler* was decided the note read:

> In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), **the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced** ... [Emphasis added.]

This language was seen as supporting the view that Rule 11(c)(1)(C) sentences are not within the purview of §3582(c)(2) because the court would have been bound to impose the same agreed-upon sentence without regard to the Guidelines. Section 1B1.10(b)(1) now reads:

> In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines

(Cont'd)

district court is without authority to modify any sentence, unless specifically authorized to do so by statute. 18 U.S.C. §3582(c). Section 3582(c) grants the authority to modify a sentence under certain circumstances, including where the sentence is based on a Guideline range that has been lowered. If § 3582(c)(2) is applicable, it affords district courts the authority to modify Rule 11(c)(1)(C) sentences.

We should be further guided by recognition that § 3582(c) sets forth other circumstances in which a district court is authorized to modify a sentence. Section 3582(c)(1) grants authority to modify

> (1) in any case--
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved

---

(Cont'd)

> listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

Thus, the policy now refers to the Guidelines range that would have been applicable, rather than the sentence that would have been imposed.

> portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> > (i) extraordinary and compelling reasons warrant such a reduction; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
> >
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;
> >
> > . . . .

If a district court lacks authority to modify a Rule 11(c)(1)(C) sentence under § 3582(c)(2) because of the binding nature of such an agreement, it should likewise lack authority to modify such a sentence upon the Director of the Bureau of Prisons' motion under § 3582(c)(1). In either case, the Government and the defendant

bargained for a sentence that became binding on the court when the agreement was accepted. Yet, § 3582(c)(1) clearly contemplates that district courts will entertain such motions and have authority to grant them. Thus, Congress did not regard the binding nature of Rule 11(c)(1)(C) sentence agreements as trumping Congressional intent to permit sentence modification in certain limited circumstances, and any argument that § 3582(c)(2) does not encompass Rule 11(c)(1)(C) sentences must be based on the specific language of § 3582(c)(2), which, as discussed above, does not support such a limitation.

Further, although a Rule 11(c)(1)(C) sentence agreement is an agreement between the Government and the defendant, it is not binding on the court unless accepted; and the court is required to exercise its independent judicial judgment in deciding whether to accept the agreement. That discretion is exercised in the context of the Guidelines. It is not simply a matter of contract.[3] Section 6B1.2 of the Guidelines Policy Statement makes this clear:

§ 6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

* * *

c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)),

[3] In *United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009), the majority criticized *Trujeque's* reliance on contract principles as misguided. *See, infra*, at pp. 9-10.

> the court may accept the agreement if the court is satisfied either that:
>
> > (1) the agreed sentence is within the applicable guideline range; or
> >
> > (2)(A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order.

To be sure, the government should not be forced to grant concessions against its will, and if a concession was given in reliance on a sentence of a certain length, without regard to the Guidelines range, the policies supporting Rule 11(e)(1)(C) may have been violated. In such a case, however, the district court is free to conclude that the sentence was not based on a Guidelines range that was subsequently amended. District judges are certainly capable of making these distinctions and identifying those Rule 11(e)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not. In many cases, the role of the Guidelines will be apparent from the agreement itself, as where the agreement sets forth certain scoring concessions and provides for a sentence within a particular area (low, center, high) of the Guidelines range. When faced with a § 3582(2) motion in the context of a Rule 11(e)(1)(C) agreement, the court should be able to evaluate the agreement and the surrounding circumstances to

determine whether the sentence was based at least in part on a subsequently reduced Guidelines range, and if so, whether and to what extent it should be reduced.

Lastly, the Tenth Circuit has recently distinguished and narrowed *Trujeque*. In *United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009), the majority distinguished *Trujeque* as involving a Rule 11 sentence that was not based on the Guidelines, because the agreed-upon term was not within the Guidelines range. Cobb's sentence, however, "was tied to the guidelines at every step," Slip op. at 3. The *Cobb* majority retreated from *Trujeque*:

> We agree with the Fourth Circuit [in *United States v. Dews*, 551 F.3d 204 (4th Cir. 2008), *rehearing en banc granted, opinion vacated* Feb. 20, 2009] that nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefitting from a favorable retroactive guideline amendment. *But see, e.g.*, *United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004) (concluding the language of Rule 11 precludes application of § 3582(c)); *United States v. Scurlark*, 560 F.3d 839, 842 (8th Cir.2009) (same). Implicitly, in *Trujeque* and our later cases relying upon it, we have imported contract analysis into our application and interpretation of § 3582. But we lack statutory or guideline authority for doing so. We are construing a statute, not common law. Importing contract ideas into our assessment of § 3582 would

hinder adequate consideration of Defendant's perfectly logical analysis and misdirect our focus from the reasonable interpretation that Congress did not intend to keep negotiated plea agreements (even those specifying a particular sentence within a properly computed guideline range) from the reach of § 3582. In § 3582(c)(2), Congress merely used the language "based upon a qualifying sentencing range." The statute imposes no requirement that to be based on a qualifying range, the sentence be a non-negotiated, "run-of-the-mill" guideline sentence. Instead, it generally allows for reductions of sentences which are based in any way on a qualifying range. No other connection is required.

With § 3582 and the authority Congress gave to the Sentencing Commission under 28 U.S.C. § 994(o), Congress intended, in part, to reduce unwarranted disparity in sentencing. *See* 28 U.S.C. § 991(b)(1)(B). Section 3582 was enacted in an environment in which an overwhelming number of cases were resolved by plea agreements, see Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L.Rev. 79, 91 fig. 1 (2005), as they still are today, see United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, fig. C (2008). Barring defendants who enter Rule 11 pleas from pursuing sentence modifications

under § 3582 tends to undermine this general pattern and ignore the pervasiveness of pleas. It also undervalues the role of the guidelines in determining the negotiable range in plea agreements. It is simply unrealistic to think that the applicable guideline range is not a major factor (if not *the* major factor) in reaching a stipulated sentence. If we categorically removed Rule 11 pleas from the reach of § 3582, it would perpetuate the very disparity § 3582 and the retroactive application of Amendment 706 were meant to correct. Such an approach would leave defendants who pled guilty before the effective date of the amendment with higher sentences than those who pled guilty afterward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges. Therefore, all defendants who entered Rule 11 pleas before the effective date of the amendment would be left serving greater sentences on the now-rejected grounds of the 100-to-1 powder-to-crack cocaine ratio.

Ultimately, we hold truer to the language of § 3582(c)(2) by concluding the district court has authority to reduce sentences imposed pursuant to Rule 11 pleas where, as here, the sentence was based at least in part on the then-applicable sentencing range.

[*Cobb*, 584 F.3d at 984-85.]

Appendix K

Were it not for *Peveler*, I would remand in both cases[4] with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate.

[4] On remand, Goins may find it difficult to make a threshold showing in light of the fact that the agreed-on sentence was above the guidelines.

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC ON JANUARY 12, 2010

Nos. 08-6374/09-5047
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO GOINS; WILLIAM FREEMAN,

Defendants-Appellants.

FILED
Jan 12, 2010
LEONARD GREEN, Clerk

ORDER

BEFORE: BOGGS, ROGERS, and WHITE, Circuit Judges.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

Appendix L

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDICES M – R: REDACTED

PETITIONER'S BRIEF

No. 09-10245

NOV 30 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM FREEMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2), based on a Guidelines sentencing range that has been subsequently lowered and made retroactive by the Sentencing Commission, solely because the district court accepted a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C).

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OTHER SOURCES

Memorandum to All Federal Prosecutors from John Ashcroft, Attorney General, Regarding Departmental Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) 32

Memorandum to All Federal Prosecutors from Eric H. Holder, Attorney General, Regarding Department Policy on Charging and Sentencing (May 19, 2010) 32

Cited Authorities

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and its denial of rehearing *en banc* are reprinted in the Joint Appendix at J.A. 70a-94a. The opinion and order of the district court denying petitioner's motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), is reprinted in J.A. 66a-69a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its opinion on November 20, 2009, and denied the petition for rehearing *en banc* on January 12, 2010. J.A. 70a-94a. The petition for a writ of certiorari was filed on April 7, 2010, and was granted on September 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The relevant statutory provision, 18 U.S.C. § 3582(c), and other provisions, Federal Rule of Criminal Procedure 11(c) and (d) and USSG § 1B1.10(c), are reprinted in an appendix to this brief.

STATEMENT OF THE CASE

In 2005, William Freeman pled guilty to offenses involving crack cocaine, marijuana, and a firearm, and was sentenced to 106 months. Mr. Freeman pled guilty to all of the charges filed against him pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) (hereinafter "C plea agreement"). J.A. 34a-35a. According to the explicit terms of the plea agreement, Mr.

Freeman agreed that his sentence would be determined pursuant to the United States Sentencing Guidelines (USSG), and the parties agreed to a sentence at the bottom of the guideline range by calculating the guideline range, consisting of 46-57 months for the crack cocaine offense and 60 consecutive months for the firearm offense. J.A. 25a-28a. The parties also agreed that the district court would independently calculate the guideline range. The court did so, reaching an identical guideline range, and imposed the agreed-upon sentence of 106 months at the bottom of that range. J.A. 28a, 47a-48a, 56a.

Thereafter, the United States Sentencing Commission reduced the base offense levels for crack cocaine offenses by two levels and made the amendment retroactive. *See* USSG App. C, amend. 706 (Nov. 1, 2007); *id.* amend. 713 (Mar. 3, 2008). Mr. Freeman moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). The district court ruled that Mr. Freeman was ineligible for a sentence reduction under § 3582(c)(2) because Sixth Circuit law prohibited a reduction when the defendant had entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A panel of the Sixth Circuit affirmed, relying on circuit precedent, with one judge concurring but strongly disagreeing with that precedent. This case presents the issue of whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) solely because the district court accepted a plea agreement under Rule 11(c)(1)(C).

1. On September 14, 2004, a Louisville, Kentucky police officer responded to a call that a robbery suspect had been identified at a liquor store. At the store, the officer recognized William Freeman from the description

of the suspect. The officer asked to speak with Mr. Freeman and told him to put his hands on a vehicle. Mr. Freeman refused and attempted to flee on foot. The two men scuffled, another officer arrived, and Mr. Freeman was subdued. When the officers brought Mr. Freeman to his feet, they found a loaded pistol and a bag containing what turned out to be 1.6 grams of marijuana on the ground where he had been lying. During a search incident to arrest, the officers found what turned out to be 3.42 grams of crack cocaine in Mr. Freeman's pants pocket. J.A. 21a-22a.

2. A superseding indictment charged Mr. Freeman with possession with intent to distribute 3.4 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C) (Count 1); possession of 1.6 grams of marijuana, a misdemeanor in violation of 21 U.S.C. § 844 (Count 2); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) (Count 4). J.A. 12a-19a. The superseding indictment charged the same four counts as the original indictment; the only difference between the original and superseding indictments was that the latter stated the quantity of drugs. J.A. 12a-19a.

3. The parties entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) under which Mr. Freeman agreed to plead guilty to all charges against him. J.A. 21a. The plea agreement provided that the government would (1) "agree that a sentence of 106 months' incarceration is the appropriate disposition of this case;" (2) recommend a reduction of three levels for

"acceptance of responsibility" under USSG § 3E1.1(a) and (b); (3) stipulate that the total quantity of drugs was 3.4 grams of a mixture or substance containing cocaine base and 1.6 grams of marijuana; (4) recommend a fine at the lowest end of the applicable guideline range; and (5) demand forfeiture of the firearm. J.A. 25a-27a.

Mr. Freeman agreed "to have his sentence determined pursuant to the Sentencing Guidelines." J.A. 28a. Paragraph 11A of the plea agreement stated:

> Both parties have independently reviewed the Sentencing Guidelines applicable in this case, and in their best judgment and belief, conclude as follows:
>
> A. The Applicable Offense Level should be determined as follows:

Base offense level:	22	USSG § 2D1.1 (drug quantity table)
	-3	USSG § 3E1.1(a) & (b).
Adjusted offense level	19	

J.A. 27a. Paragraph 11A further stated that the § 924(c) charge carried a term of 60 months' imprisonment that would run consecutively to any sentence imposed on the drug charges. J.A. 27a. Paragraph 11B stated that the parties anticipated a criminal history category of IV, but agreed that criminal history would be determined

upon completion of the Presentence Investigation Report (PSR), and reserved the right to object to the calculation of criminal history and to seek a departure from the criminal history category. J.A. 27a-28a. Otherwise, Mr. Freeman agreed that he would "not oppose imposition of a sentence incorporating the disposition provided for within [the] Agreement, nor argue for any other sentence." J.A. 32a.

The parties agreed that the "statements of applicability of sections of the Sentencing Guidelines and the statement of facts" set forth in the agreement "are not binding upon the Court," and that "the Court will independently calculate the Guidelines at sentencing." J.A. 28a. The agreement stated that Mr. Freeman "may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application," and also that if the court "refuses to accept" the agreement, "the defendant will be allowed to withdraw the plea of guilty." J.A. 28a, 31a.

In addition to his trial rights, Mr. Freeman waived his rights to directly appeal, and to "contest or collaterally attack" his conviction and resulting sentence. J.A. 28a. He did not waive his right to move for a sentence reduction under 18 U.S.C. § 3582(c)(2). The agreement contained an integration clause, stating that it was "the complete and only Agreement," and was "binding only on the parties to the Agreement." J.A. 32a.

On April 18, 2005, the district court accepted the guilty plea. J.A. 34a-35a. The Probation Office then prepared a PSR in which it calculated a total offense level of 19 and a criminal history category of IV. Thus,

the guideline range was 46-57 months followed by a mandatory consecutive sentence of 60 months on the § 924(c) charge.[1] J.A. 111a-113a, 128a, 134a.

4. At sentencing on July 18, 2005, defense counsel stated that the parties had agreed to a sentence of 106 months under a C plea agreement, that the agreed-upon sentence was within the advisory guideline range calculated by the probation officer, and requested that the court accept the plea agreement. The court responded: "Very well. The Court will adopt the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein." J.A. 47a. The court reviewed the Guidelines calculation on the record, imposed a sentence of 106 months' imprisonment (consisting of 46 months on Counts 1 and 4, a concurrent sentence of 12 months on Count 2, and a consecutive sentence of 60 months on Count 3), and noted that "the sentence imposed . . . fall[s] within the guideline range[ ] and [is] sufficient to meet the objectives of the law." J.A. 49a.

5. In June 2008, following the Sentencing Commission's retroactive two-level reduction of the base offense levels for crack cocaine offenses, *see* USSG App. C, amend. 706 (Nov. 1, 2007); *id.* amend. 713 (Mar. 3, 2008), the district court appointed counsel to represent Mr. Freeman in

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[1] Counts 1 and 4 were grouped for Guideline computation purposes, J.A. 110a-113a, and the higher offense level for Count 1 applied, *see* USSG § 3D1.3(a). No enhancement was added to the offense level for Count 1 for the firearm under USSG § 2D1.1(b)(1) because of the 60-month consecutive sentence on Count 3. *See* USSG § 2K2.4, comment. (n.4). The 1.6 grams of marijuana involved in Count 2 had no effect on the guideline range.

filing a motion for reduction in sentence under 18 U.S.C. § 3582(c)(2). The court also ordered the Probation Office to file a Memorandum of Recalculation (MOR) under seal. J.A. 60a-62a.

The MOR calculated Mr. Freeman's amended guideline range, which lowered the total offense level from 19 to 17, and resulted in a range of 37-46 months reduced from 46-57 months. J.A. 142a-143a. The MOR noted that the parties had entered into a Rule 11(c)(1)(C) plea agreement with an agreed-upon sentence of 106 months, and that the court had adopted the PSR and its guideline applications and imposed a sentence of 106 months. J.A. 141a. The MOR recommended that the district court enter an amended judgment for a reduced sentence of 37 months within the amended range as to Counts 1 and 4, to be served concurrently with 12 months on Count 2 and followed by the 60 months on Count 3, for a total term of imprisonment of 97 months. J.A. 144a.

The government did not object to the MOR. The court, however, subsequently determined that Sixth Circuit case law prohibited the court from revisiting the sentence, and ordered the Probation Office to file an amended MOR. J.A. 63a-65a. The amended MOR reiterated the previous Guidelines calculation, but now stated that no reduction was authorized because the original sentence was imposed under the terms of a binding Rule 11(c)(1)(C) agreement. J.A. 148a-151a.

Defense counsel objected to the amended MOR, arguing that Rule 11(c)(1)(C) did not preclude Mr. Freeman from receiving the two-level reduction authorized by Amendment 706 because the parties

had used the applicable Guidelines to determine the agreed-upon sentence, and the district court had relied on those Guidelines to accept the plea agreement. J.A. 153a. Counsel argued that the Sixth Circuit's decision in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004), was premised on the "dubious assertion" that a sentence agreed upon in a Rule 11(c)(1)(C) plea agreement was not calculated under the Guidelines but was determined by the agreement. J.A. 158a.

The government responded that under *Peveler*, the district court was "without authority to modify [Mr. Freeman's] sentence." J.A. 162a. The district court denied Mr. Freeman's motion because, although "not completely persuaded" by *Peveler*'s "position" that "retroactive amendments to the Sentencing Guidelines provide legally insufficient basis on which to modify a sentence under a Rule 11 C Plea," *Peveler* was "the prevailing law in the Sixth Circuit," and thus "the court cannot reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706." J.A. 68a-69a.

5. The Sixth Circuit affirmed because "[i]n *Peveler*, we held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement." *United States v. Goins*, 355 Fed. Appx. 1, *3 (6th Cir. 2010), J.A. 73a. The Sixth Circuit recognized an exception to *Peveler*'s general prohibition "where resentencing is necessary to avoid a miscarriage of justice," but ruled that Mr. Freeman did not fall within that exception because – although the district court did not indicate that Mr. Freeman's original sentence

was appropriate and indeed "felt constrained to deny Freeman's motion" – the sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment, a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing." J.A. 75a.

6. In a concurring opinion, Judge White agreed that affirmance was "mandated" by *Peveler*, but believed that "*Peveler* construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended." *Goins*, 355 Fed. Appx. at *4 (6th Cir. 2010) (White, J., concurring), J.A. 76a. Judge White explained that "[n]othing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements." J.A. 83a. She observed that "[g]iven that Rule 11(c)(1)(C) sentences are negotiated in the context of the same Guidelines as non-negotiated sentences, and are affected by the same Guidelines later rejected and amended by the Commission, there is no reason to believe Congress intended to single these sentences out and deny § 3582(c)(2) relief to defendants who pleaded guilty pursuant to Rule 11(c)(1)(C) agreements." J.A. 83a. Judge White reasoned that district courts are "certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not." J.A. 88a. "Were it not for *Peveler*," Judge White would have remanded Mr. Freeman's case "with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate." J.A. 92a.

SUMMARY OF ARGUMENT

18 U.S.C. § 3582(c)(2) authorizes a district court to consider whether to reduce a previously imposed term of imprisonment that was "based on" a guideline sentencing range that the Sentencing Commission has subsequently lowered and made retroactive. The Sentencing Commission retroactively lowered the guideline range applicable to Mr. Freeman's crack cocaine offense from 46-57 months to 37-46 months, and made the amendment retroactive. Under the common and ordinary meaning of the term "based on," Mr. Freeman's term of imprisonment was "based on" that range. The term of imprisonment was in fact at the bottom of the correctly calculated guideline range. The parties entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which stated that Mr. Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines," and set forth a correct calculation of the guideline range and an agreed-upon sentence at the bottom of that range. The probation officer independently calculated the same guideline range. The court adopted the probation officer's findings and application of the Guidelines, and imposed a sentence at the bottom of the guideline range. According to the plain words of § 3582(c)(2) and all of the record evidence, Mr. Freeman's term of imprisonment was "based on" a retroactively lowered guideline range.

The district court reluctantly denied Mr. Freeman's motion for relief under § 3582(c)(2), and the Sixth Circuit affirmed. Neither ruling was based on the language of § 3582(c)(2) or the facts of this case, but on circuit precedent holding that absent an agreement reserving the right to such relief, Rule 11(c)(1)(C) itself prohibits a

district court from considering a motion under § 3582(c)(2), notwithstanding the retroactive reduction of a relevant guideline that was used to determine the defendant's term of imprisonment.

This Court should reject the Sixth Circuit's categorical ban on § 3582(c)(2) sentence reductions in cases in which defendants entered into C plea agreements. The Sixth Circuit erred by ignoring the plain language of § 3582(c)(2), which requires only that the term of imprisonment was "based on" a retroactively lowered guideline range and contains no exception for sentences arising from C plea agreements. Binding C plea agreements had been in effect for ten years when Congress enacted § 3582(c)(2), yet Congress made no exception for sentences arising from such agreements. The Sixth Circuit's ban rests on a misreading of Rule 11(c)(1)(C) as binding the district court not only to abide by the terms of a C plea agreement in imposing sentence, but also to never reduce a sentence under § 3582(c)(2). Rule 11(c)(1)(C) does not address sentence reductions, and it cannot be interpreted to override the plain terms of § 3582(c)(2). This Court should also reject the approach of other circuits that sentences arising from C plea agreements by definition can only be "based on" the agreement and never a guideline range. Indeed, Rule 11(c)(1)(C) was amended in 1999 to reflect the impact of the Guidelines and the fact that C plea agreements are often based on the Guidelines.

This Court should instead adopt the case-by-case approach of a growing number of circuits that answer the question of whether a sentence is "based on" a subsequently amended guideline range by examining the plea agreement, the presentence report, and the

sentencing transcript in each particular case. There are many reasons to adopt such an approach, the most important of which is that the plain language of § 3582(c)(2) directs the district court to determine whether a defendant's particular "term of imprisonment" was "based on" the lowered guideline range. Moreover, the case-by-case approach better reflects actual practice. Just as the Guidelines are the starting point and initial benchmark in sentencing, so they are in plea bargaining. Courts often defer acceptance of a C plea agreement until they have reviewed the presentence report, *see* Fed. R. Crim. P. 11(c)(3)(A); USSG § 6B1.1(c), p.s., and they consider the Guidelines and justifiable departures and variances from the Guidelines in deciding whether to accept a C plea agreement, *see* USSG § 6B1.2, p.s. While not every sentence that arises from a C plea agreement is "based on" the Guidelines, a conclusive presumption that no such sentence is "based on" the Guidelines is unwarranted, as this case clearly demonstrates. Several other reasons favor adopting a case-by-case approach. It safeguards the statutory right to seek relief under § 3582(c)(2) by ensuring that any purported waiver of that right is made knowingly, intelligently, and voluntarily, and promotes transparency in the plea bargaining process. In doing so, it promotes the integrity of the judicial system in general and the plea bargaining process in particular.

The categorical approach undermines the plea bargaining process because it creates a presumption that the defendant waived his or her statutory right to seek relief under § 3582(c)(2) without an affirmative showing of a valid waiver. This conflicts with the principle that a waiver is an intentional relinquishment of a known right. The requirement that absent an agreement of the parties,

Rule 11(c)(1)(C) precludes a § 3582(c)(2) sentence reduction presumes waiver from silence. As such, it conflicts with the constitutional protections afforded guilty pleas and basic principles of contract law.

A waiver must be expressly stated in the plea agreement. If the government wished Mr. Freeman to waive his right to be considered for a § 3582(c)(2) sentence reduction, it had the obligation as the drafter of the plea agreement to include that specific provision in the document, and it bears the consequences of its failure to do so. This rule is especially applicable here, since the integration clause of the plea agreement shows that all of the terms and conditions agreed upon by the parties are contained within the four corners of the document. The document contains no waiver of rights under § 3582(c)(2). No waiver may be presumed.

The view that Rule 11(c)(1)(C) precludes relief under § 3582(c)(2) is premised on the notion that sentences imposed pursuant to C plea agreements are immutable by virtue of Rule 11(c)(1)(C). That view is contrary to congressional policy, which is to provide for review and reduction of sentences that were systematically too harsh. Moreover, the consequence of this view would be that motions by the government under Federal Rule of Criminal Procedure 35(b) and motions by the Bureau of Prisons under § 3582(c)(1)(A) would also be unavailable when the sentence arose from a C plea agreement. But that is not the case.

In sum, there is no legal, factual, or sensible policy basis for the Sixth Circuit's categorical ban on sentence reductions for defendants who entered into C plea

agreements. The judgment of the Sixth Circuit should therefore be reversed and the case remanded to the district court for consideration of Mr. Freeman's motion to reduce his sentence under § 3582(c)(2).

ARGUMENT

A DEFENDANT WHO ENTERED INTO A BINDING PLEA AGREEMENT UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 11(c)(1)(C) IS ELIGIBLE FOR A SENTENCE REDUCTION UNDER 18 U.S.C. § 3582(c)(2) WHEN HIS OR HER TERM OF IMPRISONMENT WAS "BASED ON" A GUIDELINE RANGE THAT WAS RETROACTIVELY LOWERED BY THE SENTENCING COMMISSION.

Section 3582(c)(2) provides one of the ways in which a court may "modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). It provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

"When the Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2) authorizes a district court to reduce an otherwise final sentence that is based on the amended provision." *Dillon v. United*

States, 130 S. Ct. 2683, 2688 (2010). It is undisputed that in Amendment 706, the Sentencing Commission lowered the base offense levels for crack cocaine offenses pursuant to § 994(o), *see* USSG App. C, amend. 706 (Nov. 1, 2007), and that the Commission included Amendment 706 in its list of retroactive amendments in USSG § 1B1.10(c), p.s. *See* USSG App. C, amend. 713 (Mar. 3, 2008). The only question in this case is whether William Freeman's original term of imprisonment was "based on" the subsequently lowered guideline range. It was. He is therefore eligible for a sentence reduction, and the contrary conclusion of the Sixth Circuit should be reversed.

A. Under the Plain Language of § 3582(c)(2), and According to the Express Terms of the Plea Agreement, the Presentence Report, and the Sentencing Transcript, Mr. Freeman's Original Term of Imprisonment Was "Based On" a Subsequently Lowered Guideline Range.

1. Mr. Freeman is eligible for a sentence reduction under the plain language of § 3582(c)(2).

The Court starts, "as always, with the language of the statute." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009). Section 3582(c)(2) authorizes sentence reductions in the circumstances it specifies. The only circumstance in dispute is whether Mr. Freeman's term of imprisonment was "based on" a subsequently lowered guideline range. The statute does not define "based on," but the term is a common, easily understood one, and nothing about § 3582(c)(2) suggests that the term should be given anything other than its ordinary meaning. Giving "based on" its plain meaning accords with the basic rules of

statutory construction. "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Special "guidance is hardly necessary" in interpreting such a common phrase. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). In *Nelson*, this Court had no trouble interpreting the words "based upon" in 28 U.S.C. § 1605(a)(2). Though the statute at issue contained "no definition of the phrase" and "the relatively sparse legislative history offer[ed] no assistance," the very ordinariness of the term made interpretation a simple matter of turning to the common, dictionary meaning.[2]

The verb "base" means (1) "to make, form, or serve as a base for," *see* Merriam-Webster Dictionary, www.merriam-webster.com; (2)"[t]o make, lay, or form a foundation for," *see* Oxford English Dictionary, http://dictionary.oed.com/; and (3) to "have as the foundation for (something); use as a point from which (something) can develop," *see* Oxford American College Dictionary 104 (2002). The plain language of the statute thus requires

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[2] Similarly, § 3582(c)(2)'s legislative history does not elaborate on the meaning of "based on." *See* S. Rep. No. 98-225, at 121 (1983) (stating simply that § 3582(c)(2) "permits the court to reduce a term of imprisonment . . . if the term was based on a sentencing range in the applicable guideline that was lowered by the Sentencing Commission after the defendant's sentence was imposed and if such a reduction is consistent with applicable policy statements of the Sentencing Commission"). Nor was the term the subject of the only amendment to § 3582(c)(2) since it was enacted, *see* Pub. L. 100-690, Title VII, § 7107, 102 Stat. 4418 (Nov. 18, 1988) (striking "28 U.S.C. 994(n)" and inserting "28 U.S.C. 994(o)").

that the retroactively lowered guideline range was the foundation for, or the point of development for, the term of imprisonment that was imposed.

These ordinary meanings are confirmed by the context and purpose of § 3582(c)(2). *Cf. Nelson*, 507 U.S. at 357 ("What the natural meaning of the phrase 'based upon' suggests, the context confirms."). When Congress enacted § 3582(c)(2) as part of the Sentencing Reform Act of 1984, it expected that the Commission would make amendments retroactive "because of a change in the community view of the offense," S. Rep. No. 98-225, at 180 (1983), and it intended that the "value" of the "safety valve[ ]" under § 3582(c)(2) would be "the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the guidelines," *id.* at 56. When Congress enacted § 3582(c)(2) in 1984, binding C plea agreements had been in effect for ten years.[3] If Congress meant to exclude sentences reflected in C plea agreements from the § 3582(c)(2) safety valve, it could have done so, but

[3] From 1974 to 1999, Rule 11(e)(1)(C) provided that the agreement may specify that the government will "agree that a specific sentence is the appropriate disposition of the case." Such agreements were binding on the court once accepted. *See, e.g.*, *United States v. Veri*, 108 F.3d 1311 (10th Cir. 1997); *United States v. French*, 719 F.2d 387 (11th Cir. 1983); *United States v. Stevens*, 548 F.2d 136 (9th Cir. 1977). In 1999, Rule 11(e)(1)(C) was amended to provide that the agreement may specify that the government will "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case," and to state that "[s]uch a plea agreement is binding on the court once it is accepted by the court." In 2002, subsection (e)(1)(C) was moved with minor stylistic changes to subsection (c)(1)(C).

it did not. Where, as here, a sentence was "based on" a subsequently lowered guideline range, whether or not the sentence was the subject of a C plea agreement, review and reduction must be available as Congress intended.

Mr. Freeman's sentence was clearly "based on" a subsequently lowered guideline range. He received a term of imprisonment of 106 months: concurrent terms of 12 and 46 months, with the 46-month term determined by the base offense level for 3.4 grams of crack cocaine, *see* USSG § 2D1.1(c)(9) (2004 ed.), and a consecutive statutory minimum term of 60 months under 18 U.S.C. § 924(c) and USSG § 2K2.4(b). Amendment 706 lowered the guideline range for 3.4 grams of crack from 46-57 months to 37-46 months. *See* USSG § 2D1.1(c)(10) (2008 ed.). Thus, Mr. Freeman was sentenced "based on" the subsequently lowered guideline range. Under a straightforward reading of § 3582(c)(2), Mr. Freeman is eligible for relief.

2. The express terms of the plea agreement, the presentence report, and the sentencing transcript confirm that Mr. Freeman's sentence was "based on" the subsequently lowered guideline range.

The key provision of the plea agreement is Paragraph 12: "Defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines." J.A. 28a. The plain language of Paragraph 12 alone supports the conclusion that Mr. Freeman's sentence was intended to be and was in fact "based on" the Guidelines. This conclusion is confirmed by other provisions in the agreement explaining that the agreed-upon sentence was determined by calculating the Guidelines.

Paragraph 11A states: "Both parties have independently reviewed the Sentencing Guidelines applicable in this case." J.A. 27a. The parties did not merely review the Guidelines, they applied them to the facts of Mr. Freeman's case. "[I]n their best judgment and belief," the parties "concluded" that the Guidelines would apply as follows:

> A. The applicable Offense Level should be determined as follows:
>
> | | | |
> |---|---|---|
> | Base offense level: | 22 | USSG § 2D1.1 (drug quantity table) |
> | | -3 | USSG § 3El.1(a) & (b). |
> | Adjusted offense level | 19 | |

J.A. 27a. Paragraph 11A also stated that the conviction under 18 U.S.C. § 924(c) "carries a 60-month sentence which must be served consecutively to any sentence for the underlying drug trafficking offense," J.A. 27a, which is also required by the Guidelines. *See* USSG § 2K2.4(b). And, in Paragraph 10, the paragraph in which the government agreed "that a sentence of 106 months incarceration is the appropriate disposition of this case," the government agreed to a three-level reduction for acceptance of responsibility pursuant to USSG § 3E1.1(a) and (b).[4] Thus, the parties followed the course charted

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[4] The government also agreed in Paragraph 10 to a fine at the lowest end of the applicable guideline range, J.A. 25a-26a, and Mr. Freeman agreed in Paragraph 5 to a term and conditions of supervised release as required by the Guidelines, J.A. 23a.

through the Guidelines by the application instructions in USSG § 1B1.1 (2004 ed.).

The only issue left open was Mr. Freeman's criminal history category. The parties "anticipate[d] a Criminal History Category of IV," but agreed that criminal history would be determined upon completion of the PSR, and "reserve[d] the right to object to the USSG § 4A1.1 calculation of [Mr. Freeman's] criminal history." J.A. 27a-28a. In addition, while the agreement originally stated that the parties "agree[d] not to seek a departure from the Criminal History Category pursuant to USSG § 4A1.3," that provision was crossed out and initialed by the prosecutor and defense counsel, thus permitting either party to move for such departure. J.A. 28a.

The plea agreement then specified that the foregoing statements regarding the applicability of sections of the Guidelines and the statement of facts (set forth in Paragraph 3) "are not binding upon the Court," and that the court would "independently calculate the Guidelines at sentencing." J.A. 28a.

After Mr. Freeman entered a guilty plea to all of the charges against him, the Probation Office prepared a PSR in which it independently applied the Guidelines to the facts of the case and Mr. Freeman's criminal history. The report confirmed that the total offense level was 19, the criminal history category was IV, and the guideline range was 46-57 months followed by a mandatory consecutive sentence of 60 months on the § 924(c) conviction. J.A. 134a. At sentencing, the court "adopt[ed] the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein," imposed

a sentence of 106 months, and noted that it was within the guideline range. J.A. 47a, 49a.

As shown above, the subsequently lowered guideline range was the very foundation of the plea agreement, the court's acceptance of that agreement, and the sentence imposed. Thus, Mr. Freeman's sentence was "based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). As the Tenth Circuit has correctly observed in a case involving similar facts, a sentence "may be *both* a guidelines-based sentence eligible for treatment under § 3582(c)(2) and a sentence stipulated to by the parties in a plea agreement pursuant to Rule 11(e)(1)(C)." *United States v. Cobb*, 584 F.3d 979, 984 (10th Cir. 2009) (internal quotation marks and citation omitted).[5] It does not follow from the binding nature of a Rule 11(c)(1)(C) plea agreement that the district court lacks authority to reduce a sentence under § 3582(c)(2), provided the requirements of the statute are met. They were met here. The plainly written terms of the plea agreement and the court's adoption of the probation officer's independent calculation of the guideline range in accepting that agreement establish that Mr. Freeman's sentence was "based on" the subsequently lowered guideline range.

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[5] Cobb pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(C), the predecessor of current Rule 11(c)(1)(C).

B. This Court Should Reject the Sixth Circuit's Categorical Ban on Sentence Reductions Under § 3582(c)(2) and Should Adopt a Case-by-Case Approach.

The denial of relief for Mr. Freeman by the courts below stems not from the plain language of § 3582(c)(2) or from the actual basis of the sentence as reflected in the plea agreement, the PSR, and the sentencing transcript, but instead from the mere existence of a plea agreement that, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), called for a specific sentence. According to the Sixth Circuit, Rule 11(c)(1)(C) itself precludes relief under § 3582(c)(2) for any defendant who enters into such an agreement. Other courts of appeals have reached the same result by holding that when a district court accepts such an agreement, the sentence is by definition "based on" the agreement and not on the subsequently lowered guideline range. These views find no support in § 3582(c)(2) or in Rule 11(c)(1)(C). In contrast, many courts of appeals apply a case-by-case approach, examining the terms of the agreement and the sentencing transcript to determine whether the term of imprisonment was in fact "based on" a subsequently lowered guideline range, as § 3582(c)(2) requires. This Court should reject the Sixth Circuit's categorical ban and adopt a case-by-case approach.

1. The Sixth Circuit's approach ignores the plain language of § 3582(c)(2) and rests on a misinterpretation of Rule 11(c)(1)(C).

In this case, both the district court's denial of Mr. Freeman's § 3582(c)(2) motion and the Sixth Circuit's affirmance of that denial rested solely on the Sixth Circuit's earlier decision in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004). *See* J.A. 68a-69a, 73a-74a. That decision did not rely on the language of 18 U.S.C. § 3582(c)(2), but instead held that Rule 11(c)(1)(C) itself prohibits any sentence reduction under the statute.

In *Peveler*, the defendant and the government entered into a plea agreement pursuant to Rule 11(e)(1)(C) and the defendant pled guilty to drug offenses and to carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c). *See* 359 F.3d at 372-73. The plea agreement "expressly provided" that the offense level would be 30, set out the guideline calculation, and provided that the government would "recommend a sentence of imprisonment at the low end of the applicable Guideline Range but not less than any mandatory minimum." *Id.* The district court accepted the parties' guideline calculation and imposed a sentence consistent with the plea agreement. *Id.* at 373.

Peveler subsequently filed a motion under § 3582(c)(2) to reduce his sentence in light of a retroactive amendment applicable to his sentence. *Id.* at 374. The court of appeals held:

> [A]bsent an agreement of the parties, the plain language of the current version of Rule 11(e)(1)(C), now Rule 11(c)(1)(C), generally

> precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582(c). This conclusion applies despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence.

Id. at 379. The Sixth Circuit did not rely on the language of § 3582(c)(2) to support this ruling. Instead, it decided to "defer" to its interpretation of certain language in Rule 11(c)(1)(C) and decisions under former Rule 11(e)(1)(C). *See* 359 F.3d at 378.

The court reasoned that "a rule of criminal procedure can limit a court's authority," *Peveler*, 359 F.3d at 375 (citing *United States v. Robinson*, 361 U.S. 220, 223, 229-30 (1960) (rules of procedure govern whether time for filing notice of appeal may be enlarged)); that Rule 11(c)(1)(C) and decisions under prior Rule 11(e)(1)(C) precluded a district court from accepting an agreement and then imposing a greater or lesser sentence, *id.* at 377; and thus, that Rule 11(c)(1)(C) precludes the district court from entertaining a motion under § 3582(c)(2) "despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence." *Id.* at 378-79. In sum, according to *Peveler*, Rule 11(c)(1)(C) itself binds the district court not only to abide by the terms of a C plea agreement in imposing sentence, but also to never reduce the sentence pursuant to § 3582(c)(2), even when the sentence imposed was "based on" a subsequently lowered guideline range as the statute provides.

The Sixth Circuit's reasoning is deeply flawed. First, the court ignored the plain language of § 3582(c)(2),

which requires only that the term of imprisonment was "based on" a subsequently lowered guideline range, and contains no exception for sentences arising from C plea agreements. That the district court is bound to abide by a C plea agreement in imposing sentence once it accepts the agreement does not mean that the sentence imposed is not "based on" the Guidelines as provided by § 3582(c)(2). Indeed, Rule 11(c)(1)(C) reflects the opposite assumption. It was amended in 1999 "to reflect the impact of the Sentencing Guidelines on guilty pleas," and to "recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor." Fed. R. Crim. P. 11 advisory committee's note (1999).

Second, even assuming that the Sixth Circuit was correct in its theory that a rule of procedure can limit the court's authority under the plain language of § 3582(c)(2),[6] it erred in reading into Rule 11(c)(1)(C) a limitation on the court's authority that does not exist. Rule 11(c)(1)(C) contains no hint of a prohibition on future sentence reductions under § 3582(c)(2) (or on any other

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[6] A rule of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Sixth Circuit's theory that Rule 11(c)(1)(C) can prohibit district courts from considering a motion under § 3582(c)(2) when the sentence imposed was "based on" a subsequently lowered guideline range, as the statute provides, crosses the line from "govern[ing] only 'the manner and the means' by which the litigants' rights are 'enforced,'" to "alter[ing] 'the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (internal citations and quotation marks omitted).

ground) for a defendant who entered a C plea agreement. The language in Rule 11(c)(1)(C) on which the Sixth Circuit relied was that "such a recommendation or request binds the [district] court once the court accepts the plea agreement." *Peveler*, 359 F.3d at 377. Likewise, the decisions under Rule 11(e)(1)(C) on which the Sixth Circuit relied held that a district court may not accept the agreement and then impose a sentence greater or less than the agreed-upon sentence. *See United States v. Debreczeny*, 69 Fed. Appx. 702, 705 (6th Cir. 2003); *United States v. Taylor*, 14 Fed. Appx. 546, 552-53 (6th Cir. 2001). But this language and these cases establish only the unremarkable proposition that, when a district court accepts a C plea agreement at or before sentencing, it must *impose* a sentence according to the parties' recommendation of "a specific sentence or sentencing range . . . or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." Fed. R. Crim. P. 11(c)(1)(C). This does not mean, as *Peveler* suggests, that the court may not "reduce" the sentence under § 3582(c)(2).[7] The rule does not speak to sentence *reductions* at all. When a court accepts a C plea agreement, "the agreed disposition

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[7] Even if the *Peveler* decision were correct, Mr. Freeman's plea agreement is ambiguous as to whether it was actually binding on the court. It stated that the "defendant may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application," and also that if the court "refuses to accept" the agreement, he "will be allowed to withdraw the plea of guilty." J.A. 28a, 31a. This ambiguity as to whether the agreement was binding on the court, *see* Fed. Crim. P. 11(c)(5), (d)(2)(A), must be resolved against the government as the drafter of the agreement. *See United States v. Seckinger*, 397 U.S. 203, 210 (1970); *United States v. Woods*, 581 F.3d 531, 534 (7th Cir. 2009).

[is] included in the judgment." Fed. R. Crim. P. 11(c)(4). After that sentence "has been imposed," the court "may reduce" it under the circumstances specified in § 3582(c)(2). *See* 18 U.S.C. § 3582(c); *see also Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010) (§ 3582(c)(2) "does not authorize a sentencing," but instead "giv[es] courts the power to 'reduce' an otherwise final sentence.").

The *Peveler* court also noted that there may be exceptions to its otherwise "blanket bar" on § 3582(c)(2) relief to allow modification "to avoid a miscarriage of justice or to correct a mutual mistake." 359 F.3d at 378 n.4 (internal quotation marks and citation omitted). The Sixth Circuit's recognition of exceptions undermines its ruling that a Rule 11(c)(1)(C) plea renders a defendant automatically ineligible for a sentence reduction under § 3582(c)(2). It cannot be that, even though § 3582(c)(2) makes no mention of Rule 11(c)(1)(C), it both silently forbids reduction of sentences arising from C plea agreements and silently creates an exception to its own silent ban.[8]

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[8] In this case, the Sixth Circuit ruled that Mr. Freeman did not meet *Peveler's* "miscarriage of justice" exception – even though the district court indicated that it would grant Mr. Freeman's motion for a reduction in sentence if not for *Peveler* – because his sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment." J.A. 75a. This, of course, is generally true of defendants seeking a two-level reduction under Amendments 706 and 713. These amendments were promulgated to partially remedy an "urgent and compelling" injustice. *See* USSG App. C, amend. 706 (Nov. 1, 2007) (reason for amendment); *id.* amend. 713 (reason for amendment). Any amount of actual jail time, including an amount due to a two-level difference in a guideline range, is significant. *Cf. Glover v. United States*, 531 U.S. 198 (2001).

The *Peveler* court also found support in inapposite caselaw. It stated that the Tenth Circuit, in *United States v. Trujeque*, 100 F.3d 869 (10th Cir. 1996), and the Seventh Circuit, in *United States v. Hemminger*, 114 F.3d 1192, 1997 WL 235838 (7th Cir. May 2, 1997) (unpublished table decision), had "held that retroactive amendments to the sentencing guidelines provide legally insufficient basis on which to modify a sentence under a Rule 11(e)(1)(C) plea agreement." 359 F.3d at 377. But *Trujeque* said no such thing. In that case, the Tenth Circuit applied a case-by-case approach, finding that the "facts establish that Mr. Trujeque's sentence was not 'based on a sentencing range that has subsequently been lowered,'" where the original guideline range was 121-151 months and the parties stipulated to a sentence of 84 months without explaining how this sentence was reached. *Trujeque*, 100 F.3d at 870 & n.2, 871. The Tenth Circuit has since made clear that *Trujeque*'s holding does not apply in a case in which the agreed-upon disposition was in fact "based on" the Guidelines. *See United States v. Cobb*, 584 F.3d 979, 983 (10th Cir. 2009). *Hemminger*, a one page non-precedential opinion, simply declared without explanation that a "sentence under a Rule 11(e)(1)(C) plea rests on the parties' agreement, not on a calculation under the Sentencing Guidelines." 1997 WL 235838, at *1. The Seventh Circuit has since held that not all Rule 11(e)(1)(C) agreements foreclose relief under § 3582(c)(2); if, for example, the original sentence was below the guideline range and the plea agreement explains how that sentence was reached in relation to the guideline range, then the sentence was "based on" the guideline range. *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010).

Nonetheless, a categorical rule has been followed by other circuits, which have concluded that the binding nature of Rule 11(c)(1)(C) deprives the district court of authority to modify the sentence at any time, *see United States v. Scurlark*, 560 F.3d 839, 841-43 (8th Cir.), *cert. denied*, 130 S. Ct. 738 (2009), or that a sentence imposed under a C plea agreement is by definition "based on" the agreement and not on the Guidelines, *see United States v. Green*, 595 F.3d 432, 437 (2d Cir. 2010); *United States v. Sanchez*, 562 F.3d 275, 282 & n.8 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1053 (2010).

A growing number of courts of appeals disagree, recognizing that "wooden rules will not do," and that answering the question of "whether a sentence is 'based on' the subsequently amended crack-offense guidelines . . . requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case." *United States v. Garcia*, 606 F.3d 209, 214 (5th Cir. 2010); *see also United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) (stating that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission"), *cert. denied*, 130 S. Ct. 1160 (2010); *Cobb*, 584 F.3d at 983-84 (concluding that district court had authority to consider defendant's motion under § 3582(c)(2) where plea agreement, change of plea hearing, and sentencing hearing all reflected that defendant's sentencing disposition "was tied to the guidelines at every step"); *Franklin*, 600 F.3d at 896-97 (clarifying that a sentence below the guideline range may be "based on" the guidelines if the plea agreement evidences "an intent to tie the sentence to the guidelines"); *United States v. Main*,

579 F.3d 200, 203 (2d Cir.) (concluding from examination of plea agreement, guidelines, and sentencing transcript that defendant's sentence was not "based on" a guideline that was subsequently lowered), *cert. denied*, 130 S. Ct. 1106 (2009); *United States v. Williams*, 609 F.3d 368, 373 (5th Cir. 2010) (review of plea agreement, sentencing record, and guidelines revealed no connection to guidelines).

2. The case-by-case approach implements the plain language of § 3582(c)(2), comports with actual sentencing practice, and promotes the integrity of the judicial system in general and the plea bargaining process in particular.

This Court should reject the Sixth Circuit's categorical rule and instead adopt a case-by-case approach. A case-by-case approach implements § 3582(c)(2)'s plain language, which directs the district court to determine whether a defendant's particular "term of imprisonment" was "based on" the subsequently lowered guideline range. A district court can best accomplish that task by reviewing the specific terms of a plea agreement, the applicable guideline calculations, and the sentencing record. "District judges are certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not," by "evaluat[ing] the agreement and the surrounding circumstances." *Goins*, 355 Fed. Appx. at 8, J.A. 88a. (White, J., concurring).

The case-by-case approach reflects actual practice. The Guidelines are "the starting point and the initial benchmark" for all sentencing decisions. *Gall v. United States*, 552 U.S. 38, 49 (2007). Accordingly, the Guidelines

are, at least, the starting point and initial benchmark for plea negotiations. As Judge White correctly noted, "Rule 11(c)(1) negotiations and the resulting agreements are informed and shaped by the existing Guidelines. The parties evaluate their gains and concessions using the Guidelines as their yardstick." J.A. 82a (White, J., concurring). In some cases, as in this case, the Guidelines are not just the starting point in the negotiations but the end point. Mr. Freeman's plea agreement specifically stated that it was based on the Guidelines, and it set forth a guideline calculation that was determined by the Probation Office and the court to be correct. J.A. 27a-28a, 47a, 111a-113a, 128a, 134a.

As a general matter, under Rule 11 and the Sentencing Commission's policy statements, the district court considers the correctly calculated guideline range in deciding whether to accept a C plea agreement. The court may accept or reject a C plea agreement when the plea is entered, or, as here, "defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A); USSG § 6B1.1(c), p.s. (same). Further, § 6B1.2(c), p.s., advises: "In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order." *Id.* Here, the court accepted the agreement after satisfying itself that the agreed sentence was within the applicable guideline range. J.A. 47a, 49a. In other cases, the court satisfies itself that the agreed sentence departs or varies from the guideline range for justifiable reasons.

The Commission recognizes that sentences below the guideline range can be "based on" the guideline range by acknowledging that such sentences may be reduced. USSG § 1B1.10(b)(2)(B), p.s.; *id.* comment. (n.3).

As a general matter, prosecutors must consider the Guidelines in negotiating plea agreements and making sentencing recommendations. Department of Justice guidance in effect at the time of Mr. Freeman's original sentencing directed prosecutors that "[a]ny sentencing recommendation . . . must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct." Memorandum to All Federal Prosecutors from John Ashcroft, Attorney General, Regarding Departmental Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, at 5 (Sept. 22, 2003). This guidance further stated that there were "only two types of permissible sentence bargains" – "1. Sentences within the Sentencing Guidelines range," and "2. Departures." *Id.* at 6. As to the latter, prosecutors were directed "to ensure that the circumstances in which [they] will request or accede to a downward departure in the future are properly circumscribed," and to obtain Department or supervisory authorization for any such departure. *Id.* Attorney General Holder recently issued guidance directing that "prosecutors should generally continue to advocate for a sentence within [the guideline] range," and that all "prosecutorial requests for departures or variances – upward or downward – must be based on specific and articulable facts, and require supervisory approval." Memorandum to All Federal Prosecutors from Eric H. Holder, Attorney General, Regarding Department Policy on Charging and Sentencing, at 2-3 (May 19, 2010).

Of course, not every sentence reflected in a C plea agreement is "based on" the applicable guideline range. But a conclusive presumption that *no* such sentences are "based on" the applicable guideline range is not consistent with actual practice.

Moreover, a case-by-case approach serves several salutary purposes. It safeguards the statutory right to seek relief under § 3582(c)(2) by ensuring that any purported waiver of that right is made knowingly, intelligently, and voluntarily, and promotes transparency in the plea bargaining process. In doing so, it promotes the integrity of the judicial system in general and the plea bargaining process in particular.

In contrast, a categorical approach undermines the plea bargaining process because it acts as a presumption that the defendant waived his or her statutory right without an affirmative showing of a valid waiver of the right. Such a presumption is antithetical to the general rules for establishing the validity of a guilty plea, and conflicts with the principle that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). And, as discussed in Part C, *infra*, presuming waiver where, as here, the plea agreement is silent on the availability of § 3582(c)(2), violates basic principles of contract law.

For all of these reasons, the Court should reject the Sixth Circuit's categorical ban and adopt a case-by-case approach. Applying such an approach in this case requires reversal of the judgment below, as the plea agreement, presentence report, and transcript of the sentencing

hearing all demonstrate that Mr. Freeman's term of imprisonment was "based on" a subsequently lowered guideline range. *See supra* pages 3-6, 18-21.

C. The Absence of Any Reference to § 3582(c)(2) Relief in the Plea Agreement Does Not Constitute a Waiver of the Right to Seek That Relief.

The Sixth Circuit precludes defendants with Rule 11(c)(1)(C) plea agreements from obtaining consideration of a motion for sentence reduction under § 3582(c)(2) "absent an agreement of the parties." *Peveler*, 359 F.3d at 379. The First Circuit has adopted the same view. *See United States v. Rivera-Martinez*, 607 F.3d 283, 284 (1st Cir. 2010) ("[I]n the absence of explicit countervailing language in the plea agreement, 18 U.S.C. § 3582(c)(2) does not apply and, therefore, such a defendant is ineligible for the sentence reduction."); *id.* at 287 (citing *Peveler*, 359 F.3d at 378-79). This view that the opportunity to file a motion under § 3582(c)(2) is waived unless specifically reserved not only conflicts with basic contract law but also conflicts with the constitutional protections surrounding guilty pleas, and is further flawed because it presumes waiver from silence.

Ordinary principles of contract interpretation are used to determine whether a right has been waived. *See United States v. Cooley*, 590 F.3d 293, 296 (5th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009). A plea agreement, of course, is more than an ordinary contract because it involves the waiver of fundamental constitutional rights as well as other important rights, and "necessarily implicates the integrity of the criminal justice system." *United States v. Cvijanovich*, 556 F.3d 857, 862

(8th Cir. 2009) (internal quotation marks and citation omitted). Since a guilty plea implicates a defendant's fundamental and constitutional rights, a court must "analyze a plea agreement with greater scrutiny than [it] would apply to a commercial contract . . . [and] thus hold the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements." *United States v. Jordan*, 509 F.3d 191, 195-96 (4th Cir. 2007).

In the absence of an explicit waiver of the right to have a motion for relief under § 3582(c)(2) considered, a waiver cannot be presumed, implied, or read into the plea agreement. To do so would undermine the validity of the guilty plea, which requires a knowing and voluntary waiver of rights. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969). "[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary and that the defendant must make related waivers knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (internal quotation marks and other citations omitted).

A waiver likewise cannot be implied from silence under ordinary contract principles. A waiver must be explicitly stated. In interpreting a collective bargaining agreement, this Court has said that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983) (footnote

omitted). That principle applies with equal, if not greater, force to plea agreements. *See Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984) (while a plea agreement is an "executory agreement," it takes on "constitutional significance" when "embodied in the judgment of a court"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (desirability of plea bargaining "presupposes fairness in securing agreement between an accused and a prosecutor").

Silence on whether relief may be sought under § 3582(c)(2) cannot waive the right to do so. While Mr. Freeman and the government may have agreed to a particular sentence, they did not agree that the sentence could never be reduced pursuant to § 3582(c)(2). Where, as here, a plea agreement is silent on § 3582(c)(2), it must be presumed that the defendant did not waive the right to a future sentence reduction under the statute. Such a presumption clarifies the plea bargaining responsibilities of the parties by requiring that the drafter include an express waiver of § 3582(c)(2) rights if that is intended. That result, as shown below, is required by well-established principles of contract law.

In any event, Mr. Freeman's plea agreement explicitly precludes a waiver of § 3582(c)(2) relief from being read into or implied from it. Paragraph 25 states:

> This document states the complete and only Plea Agreement between the United States Attorney for the Western District of Kentucky and [Mr. Freeman] in this case, and is binding only on the parties to this Agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified

> other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have been or will be made to [Mr. Freeman] in connection with this case, nor have any predictions or threats been made in connection with this plea.

J.A. 32a. Paragraph 25, which is characterized as an "integration clause," *see United States v. De-La-Cruz Castro*, 299 F.3d 5, 13 (1st Cir. 2002), means that all of the terms and conditions agreed upon by the parties are contained within the four corners of the document. *See United States v. Hunt*, 205 F.3d 931, 933 (6th Cir. 2000) (integration clause restricted the terms of the plea agreement "to those written within its four corners"). In evaluating a plea agreement, the court, "[c]onsistent with contract-law principles [will] look to the language of the document, focusing squarely within its four corners." *United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990); *see also United States v. Ortiz-Santiago*, 211 F.3d 146, 151 (1st Cir. 2000) (stating that "an inquiring court should construe the written document within its four corners, unfestooned with covenants the parties did not see fit to mention") (internal quotation marks and citations omitted). Within the four corners of Mr. Freeman's plea agreement, there is no language that can be construed as either an implicit or explicit waiver of consideration of a motion for a sentence reduction under § 3582(c)(2).

If the government wished Mr. Freeman to waive any future consideration of a § 3582(c)(2) sentence reduction, it had the obligation as the drafter of the plea agreement to include that provision in the document and it bears the consequences of its failure to do so. "In view of the

government's tremendous bargaining power [courts] will strictly construe the text against it when it has drafted the agreement." *United States v. Floyd*, 428 F.3d 513, 516 (3d Cir. 2005) (internal quotation marks and citation omitted). "'Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.'" *United States v. Herrera*, 928 F.2d 769, 772 (6th Cir. 1991) (quoting *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986)).

To hold, as the Sixth Circuit did in *Peveler*, that silence as to § 3582(c)(2) relief bars such relief turns a fundamental principle of contract law on its head. To determine whether there has been a waiver of the right to seek § 3582(c)(2) relief, courts have looked to the specific terms of the plea agreement and found waiver only when clearly stated in the plea agreement. *Compare, e.g., United States v. Stearns*, 479 F.3d 175, 177 (2d Cir. 2007) (§ 3582(c)(2) mentioned explicitly in waiver) *and United States v. Frierson*, 308 Fed. Appx. 298, 300 (10th Cir. 2009) (same) *with United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009) (finding no waiver of § 3582(c)(2) relief where not expressly stated). Mr. Freeman's plea agreement contained no such express provision.[9] This absence must be held against the government as the drafter of the plea agreement.

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[9] Paragraph 13 of the plea agreement provided that Mr. Freeman "knowingly and voluntarily waives the right (a) to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742, and (b) to contest or collaterally attack his conviction and the resulting sentence (Cont'd)

D. Sentences Imposed Pursuant to Rule 11(c)(1)(C) Are Not Immutable.

The view that Rule 11(c)(1)(C) precludes relief under 18 U.S.C. § 3582(c)(2) is premised on the notion that sentences imposed pursuant to C plea agreements are immutable by virtue of Rule 11(c)(1)(C). That view, however, is contrary to congressional policy. As this Court noted in *Dillon v. United States*, "§ 3582(c)(2) [was] intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." 130 S. Ct. 2683, 2692 (2010). When the Sentencing Commission lowers a guideline range and further determines that this reduction should apply retroactively, it recognizes that the original guideline was too harsh – so unfairly harsh that it is now necessary for *all* defendants whose sentences were based on that guideline to have an opportunity to obtain a sentence reduction. In such circumstances, Congress expected all sentences "based on" the reduced guideline range to be retroactively revisited. District courts retain discretion not to change sentences. But the nature of a plea agreement is not a bar to the important policy of providing review of sentences that were systematically too harsh.

Indeed, barring any future relief for defendants who entered into C plea agreements on the theory that Rule 11(c)(1)(C) renders their sentences immutable would mean

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(Cont'd)
pursuant to 28 U.S.C. § 2255 or otherwise." J.A. 28a. This language does not waive the right to seek a § 3582(c)(2) sentence reduction. *See, e.g., United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009); *United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009); *United States v. Chavez-Salais*, 337 F.3d 1170, 1172-73 (10th Cir. 2003).

that motions filed by the government under Federal Rule of Criminal Procedure 35(b), and motions filed by the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A), are unavailable in cases in which the district courts accepted C plea agreements. That is clearly not the case.

Federal Rule of Criminal Procedure 35(b) allows the government to make a post-sentencing motion for a sentence reduction where a defendant has "provided substantial assistance in investigating or prosecuting another person." Courts have not viewed sentences imposed pursuant to Rule 11(c)(1)(C) as immutable for purposes of a Rule 35(b) sentence reduction. For example, in *United States v. Kollore*, No. 4:99CR553, 2009 WL 212959 (E.D. Mo. Jan. 28, 2009), the court, acting on the government's Rule 35(b) motion, later reduced the sentence of a defendant who had entered into a C plea agreement. *See also United States v. Roe*, 104 F.3d 357 (2d Cir. 1996) (defendant who entered into C plea agreement thereafter received Rule 35(b) departure for cooperation); *cf. United States v. Pollard*, 602 F. Supp. 2d 165, 168, 172-73 (D.D.C. 2009) (denying defendant's claim in 28 U.S.C. § 2255 proceeding that "the government engaged in prosecutorial misconduct by not filing a motion under Rule 35 to reduce her sentence," because C plea agreement stated that "the Government is not obligated and does not intend to file" a post-sentence Rule 35(b) motion). And, while motions for relief under 18 U.S.C. § 3582(c)(1)(A) by defendants who entered C pleas have been denied, it is not because of the type of plea they entered, but because the Bureau of Prisons did not file the motion as the statute requires. *See, e.g., United States v. Ayala*, 351 Fed. Appx. 147, 149 (8th Cir. 2009).

The foregoing cases demonstrate that a C plea agreement is not in and of itself a bar to a subsequent sentence reduction, whether that reduction stems from Rule 35(b), § 3582(c)(1)(A), or § 3582(c)(2). If a C plea agreement does not preclude a defendant from receiving Rule 35(b) relief, then there is no reason that it should render him or her ineligible for a § 3582(c)(2) sentence reduction. From a policy standpoint, it would frustrate the interests of law enforcement in obtaining post-sentencing assistance from defendants if the government could not file a Rule 35(b) motion merely because a defendant entered into a C plea agreement.

If sentences imposed under Rule 11(c)(1)(C) were immutable, it would likewise frustrate 18 U.S.C. § 3582(c)(1)(A)(i) and (ii), which provide that the district court, upon motion of the Director of the Bureau of Prisons, may reduce a term of imprisonment if it finds that there are "extraordinary and compelling reasons" for doing so or "the defendant is at least 70 years of age" and "has served at least 30 years." As Judge White pointed out in her concurring opinion in this case, if Rule 11(c)(1)(C) deprives the district court of the authority to reduce a sentence under § 3582(c)(2), it would likewise deprive the court of authority to reduce the sentence of a defendant who met the criteria of § 3582(c)(1)(A)(i) or (ii). J.A. 86a. As she explained:

> In either case, the Government and the defendant bargained for a sentence that became binding on the court when the agreement was accepted. Yet, § 3582(c)(1) clearly contemplates that district courts will entertain such motions and have authority to grant them. Thus, Congress

> did not regard the binding nature of Rule 11(c)(1)(C) sentence agreements as trumping Congressional intent to permit sentence modification in certain limited circumstances, and any argument that § 3582(c)(2) does not encompass Rule 11(c)(1)(C) sentences must be based on the specific language of § 3582(c)(2), which . . . does not support such a limitation.

J.A. 86a-87a. The Sixth Circuit's position that Rule 11(c)(1)(C) renders immutable sentences imposed under its terms contravenes the plain language of § 3582(c)(1)(A) and (c)(2) and undermines the important "value" of these "safety valves" to "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' and to respond to changes in the guidelines." S. Rep. No. 98-225, at 21 (1983).

* * * * * * * * *

As Mr. Freeman has shown, a guideline that was subsequently lowered figured prominently in his plea agreement, culminating with the provision that he "agrees to have his sentence determined pursuant to the Sentencing Guidelines," and a sentence imposed within the correctly calculated guideline range. J.A. 28a, 47a, 49a, 110a-113a. The Guidelines were the very foundation of Mr. Freeman's plea agreement and Paragraphs 10-12 thereof establish that the "appropriate disposition of this case" was "based on" the subsequently lowered guideline for his offense of possession with intent to distribute 3.4 grams of crack cocaine. J.A. 25a-28a. The Sixth Circuit's categorical ban on § 3582(c)(2) sentence reductions for defendants who enter C plea agreements not only

contravenes the plain language of § 3582(c)(2) and Rule 11, but also frustrates the Sentencing Commission's attempt to provide relief to defendants who were subject to an unduly harsh sentence. This case demonstrates that the best way to determine whether the sentence of a defendant who entered a C plea agreement is or is not "based on" the Guidelines is a case-by-case approach that examines the terms of the plea agreement, the applicable Guidelines, and the sentencing transcript. Mr. Freeman respectfully urges the Court to adopt that approach in resolving the question presented.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case should be remanded to the district court for consideration of Mr. Freeman's motion under § 3582(c)(2).

Respectfully Submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES AND OTHER PROVISIONS

1. 18 U.S.C. § 3582(c) - Imposition of a sentence of imprisonment, states:

> **(c) Modification of an imposed term of imprisonment** – The court may not modify a term of imprisonment once it has been imposed except that–
>
> (1) in any case–
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that–
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned,

> and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and
>
> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

2. **Federal Rule of Criminal Procedure 11 - Pleas,** states in relevant part:

> **(c) Plea Agreement Procedure.**

Appendix A

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for

good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

> (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

> (A) the court rejects a plea agreement under Rule 11(c)(5); or
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

3. United States Sentencing Guidelines § 1B1.10 – Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement) states in pertinent part:

> *****

(c) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

RESPONDENT'S BRIEF

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In the Supreme Court of the United States

WILLIAM FREEMAN, PETITIONER

v

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the government and a defendant may enter into a plea agreement in which they "agree that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Under 18 U.S.C. 3582(c)(2), a district court may reduce a term of imprisonment after it has been imposed if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and "such a reduction is consistent with applicable policy statement issued by the Sentencing Commission." The question presented is

Whether a defendant who pleaded guilty under a Rule 11(c)(1)(C) plea agreement to a specific sentence may seek a reduction of that sentence under Section 3582(c)(2) after the retroactive reduction of a Guidelines range, on the theory that the sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

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Santobello v *New York*, 404 U S 257 (1971) 40, 41

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United States v *Berry*, 618 F 3d 13 (D C Cir 2010) 23

United States v *Booker*, 543 U S 220 (2005) 5

United States v *Bride*, 581 F 3d 888 (9th Cir 2009), cert denied, 130 S Ct 1160 (2010) 23

United States v *Cieslowski*, 410 F 3d 353 (7th Cir 2005), cert denied, 546 U S 1097 (2006) 34, 42

United States v *Cobb*, 584 F 3d 979 (10th Cir 2009) 22, 34

United States v *Dews*, 551 F 3d 204 (4th Cir 2008), vacated on grant of reh'g en banc, No 08-6458 (4th Cir Feb 20, 2009), dismissed as moot, No 08-6458 (4th Cir May 4, 2009) 22

United States v *Frady*, 456 U S 152 (1982) 20

United States v *Franklin*, 600 F 3d 893 (7th Cir 2010) 23

United States v *French*, 719 F 2d 387 (11th Cir 1983), cert denied, 466 U S 960 (1984) 30

United States v *Garcia*, 606 F 3d 209 (5th Cir 2010) 23

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United States v *Mann*, 579 F 3d 200 (2d Cir 2009), cert denied, 130 S Ct 1106 (2010)	22
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Administrative Office of the U S Courts, *2009 Annual Report of the Director Judicial Business of the United States Courts* (2010), http // www uscourts gov/uscourts/Statistics/Judicial Business/2009/JudicialBusinespdfversion pdf	40
72 Fed Reg (2007)	
pp 28,571-28,572	6
p 28,573	6
73 Fed Reg 217 (2008)	6
Federal Bureau of Prisons, U S Dep't of Justice, *Program Statement P5100 08, Inmate Security Designation and Custody Classification* (Sept 12, 2006), http //www bop gov/policy/ progstat/5100_008 pdf	39
S Rep No 225, 98th Cong , 1st Sess (1983)	29, 21, 31
The American Heritage Dictionary of the English Language (4th ed 2006)	24
1 *The Oxford English Dictionary* (2d ed 1989)	24

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W D Ky Gen Order No 2008-01 (Feb 20, 2008), http //www kywd uscourts gov/pdf/GeneralOrder_2008-01 pdf 12

Webster's New International Dictionary of the English Language (2d ed 1958) 24

Webster's Third New International Dictionary of the English Language (1981) 24

11 Charles Alan Wright et al , *Federal Practice and Procedure* (2d ed 1995) 26

In the Supreme Court of the United States

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v

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J A 70a-92a) is not published in the *Federal Reporter* but is available at 355 Fed Appx 1 The opinion of the district court (J A 66a-69a) is unreported

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2009 A petition for rehearing was denied on January 12, 2010 (J A 93a-94a) The petition for a writ of certiorari was filed on April 7, 2010, and granted on September 28, 2010 The jurisdiction of this Court rests on 28 U S C 1254(1)

STATUTES, RULES AND GUIDELINES PROVISIONS INVOLVED

Pertinent statutes and provisions of the Federal Rules of Criminal Procedure and the United States Sentencing Guidelines are reprinted in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

Following a guilty plea in the Western District of Kentucky, petitioner was convicted of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), possessing marijuana, in violation of 21 U.S.C. 844, possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A), and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2). Pursuant to a plea agreement to a specific sentence under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, he was sentenced to 106 months of imprisonment, to be followed by five years of supervised release. J.A. 52a-57a. The United States Sentencing Commission later amended the Sentencing Guidelines to lower the base offense level for drug-trafficking offenses involving crack cocaine and made those amendments retroactively applicable to previously imposed sentences of imprisonment. In light of those amendments, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2). The district court denied that motion, J.A. 66a-69a, and the court of appeals affirmed, J.A. 70a-92a.

1. a. Federal Rule of Criminal Procedure 11(c) establishes procedures for plea agreements. It provides that "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement." Fed. R.

Crim P 11(c)(1) The rule then "divides plea agreements into three types, based on what the [g]overnment agrees to do" *United States* v *Hyde*, 520 U S 670, 675 (1997) In the type at issue here—sometimes called a "type C" agreement, see *ibid* , because it is described in Subparagraph (C) of Rule 11(c)(1)—the government and the defendant agree on aspects of the sentence that bind the sentencing court if the plea is accepted More specifically, the rule provides as follows

> the plea agreement may specify that an attorney for the government will
>
> * * * * *
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)

Fed R Crim P 11(c)(1) [1] The rule further permits the district court to "accept [a type C] agreement, reject it or defer a decision until the court has reviewed the presentence report" Fed R Crim P 11(c)(3)(A)

Consistent with the "bind[ing]" nature of a type C agreement once it is "accept[ed]" by the court (Fed R Crim P 11(c)(1)(C)), the court is required, upon accepting the agreement, to "inform the defendant that * * * the agreed disposition will be included in the judgment" Fed R Crim P 11(c)(4), see *United States* v *Kling*, 516

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[1] Until 2002, the substance of Rule 11(c)(1)(C) appeared in Rule 11(e)(1)(C) When the provision was moved from subdivision (e) to (c) in 2002, the amendments were "intended to be stylistic only" Fed R Crim P 11 committee's note (2002 Amendment)

F 3d 702, 704 (8th Cir 2008) ("A plea agreement under Rule 11(c)(1)(C), like all plea agreements, is binding on both the government and the defendant, but Rule 11(c)(1)(C) plea agreements are unique in that they are also binding on the court *after* the court accepts the agreement") Similarly, if the court rejects such an agreement, it must, *inter alia*, "advise the defendant" that it is "not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea" Fed R Crim P 11(c)(5)(B)

b In the Sentencing Reform Act of 1984 (SRA), 28 U S C 991 *et seq* , Congress created the United States Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U S C 994(a)(1) and (2) Congress also charged the Commission with periodically reviewing and revising its guidelines 28 U S C 994(*o*) When the Commission reduces a sentencing range, it may specify "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" 28 U S C 994(u) As a result, the Commission has "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect" *Braxton* v *United States*, 500 U S 344, 348 (1991) (emphasis omitted)

A court generally "may not modify a term of imprisonment once it has been imposed" 18 U S.C 3582(c), see *Dillon* v *United States*, 130 S Ct 2683, 2687 (2010) But, as relevant here, an exception to that structure permits a modification "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by

the Sentencing Commission pursuant to 28 U S C 994(*o*) " 18 U S C 3582(c)(2) In such a case, Section 3582(c)(2) gives a court the discretion to "reduce the term of imprisonment," after considering the statutory sentencing factors set out in 18 U S C 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission " 18 U S C 3582(c)(2), see 28 U S C 994(a)(2)(C) (authorizing the Commission to promulgate policy statements "regarding * * * the sentence modification provisions set forth in section[] * * * 3582(c)")

The Commission has addressed such sentence reductions in a policy statement contained in Sentencing Guidelines § 1B1 10 Under that provision, a court may reduce a sentence if the amendment that lowered a Guidelines sentencing range is listed in subsection (c) *Id* § 1B1 10(a)(1), p s But no reduction is permitted if, *inter alia*, "[the] amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range " *Id* § 1B1 10(a)(2)(B), p s To calculate the amended guideline range, the court is instructed that it "shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected " *Id* § 1B1 10(b)(1), p s [2]

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[2] *Dillon* concluded that a sentence modification proceeding under Section 3582(c) is "fundamental[ly] differen[t]" from a "sentencing" proceeding 130 S Ct at 2693 Thus, even though the Sentencing Guidelines were generally rendered advisory by *United States* v *Booker*, 543 U S 220 (2005), a court may grant a reduction under Section 3582(c)(2) only "within the narrow bounds established by the Commission" in its policy statement in Guidelines § 1B1 10 *Dillon*, 130 S Ct at 2694

c This case involves the Sentencing Commission's 2007 amendments reducing the Guidelines sentencing ranges for offenses involving crack cocaine and specifying that those changes were retroactively applicable to sentences that had already been imposed

Under the Sentencing Guidelines, a drug-quantity table (Guidelines § 2D1 1(c)) sets the base offense levels for drug offenses Between 1987 and 2007, that table "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine," because Congress had used that ratio in setting mandatory minimum sentences in 1986 *Kimbrough* v *United States*, 552 U S 85, 96 (2007) "After several failed attempts" to reform the 100-to-1 ratio, "the Commission in 2007 amended the Guidelines to reduce by two levels the base offense level associated with each quantity of crack cocaine " *Dillon*, 130 S Ct at 2688, see 72 Fed Reg 28,571-28,572 (2007), Guidelines App C Supp , Amend 706 (amended by Amends 711 and 715) The Commission later voted to make the crack-cocaine amendments retroactively applicable to sentences that had already been imposed, by including those amendments in Guidelines § 1B1 10(c) See 73 Fed Reg 217 (2008), Guidelines App C Supp , Amend 713 [1]

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[1] The Commission described its 2007 amendments as only "an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio," and it noted that "[a]ny comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress " 72 Fed Reg at 28,573 Legislative action recently came in the form of the Fair Sentencing Act of 2010 (2010 Act), Pub L No 111-220, 124 Stat 2372, which raised the quantity of cocaine base that triggers a five-year mandatory-minimum sentence from 5 to 28 grams, and raised the quantity that triggers a ten-year mandatory-minimum sentence from 50 to 280 grams *Id* § 2(a), 124 Stat 2372 Because the 2010 Act did not change the threshold quantities of powder cocaine (500

Approximately 25,000 defendants have sought sentence reductions in light of the Commission's decision to make the 2007 amendments retroactive, and more than 16,000 reductions have been granted. See U.S. Sentencing Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, tbl. 1 (Nov. 2010 Data), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20101214_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf. Defendants who received such reductions have had their sentences reduced by an average of 26 months. *Id.* tbl. 8.

2. On September 14, 2004, an officer with the Louisville Metropolitan Police Department responded to a call and identified petitioner as matching the description of a robbery suspect. When the officer asked to speak with petitioner and instructed him to put his hands on the police vehicle, petitioner refused and tried to flee on foot. A scuffle ensued, and petitioner was subdued after a backup officer arrived. The officers found a loaded pistol and a bag of marijuana on the ground where petitioner had been. During a search incident to arrest, the

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and 5000 grams) that trigger five- and ten-year mandatory-minimum sentences, see 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii), the 2010 Act lowered the statutory crack-to-powder ratio from 100-to-1 to about 18-to-1.

Pursuant to Section 8 of the 2010 Act, 124 Stat. 2374, the Commission promulgated emergency, temporary amendments to the Guidelines, effective November 1, 2010, that lowered the crack-to-powder ratio in the drug-quantity table, to about 18-to-1. See *Supplement to the 2010 Guidelines Manual* (Nov. 1, 2010). The Commission did not add those amendments to Guidelines § 1B1.10(c), and they are thus not retroactively applicable to previously imposed sentences. (Nor did the 2010 Act make its revisions to the mandatory minimums applicable to offenses committed before its enactment.) The Commission is considering permanent amendments to implement the 2010 Act.

officers found 3 42 grams of crack cocaine, packaged for distribution, in one of petitioner's pockets J A 21a-22a

a On January 4, 2005, a grand jury in the Western District of Kentucky returned a superseding indictment charging petitioner with possessing with intent to distribute approximately 3.42 grams of cocaine base, in violation of 21 U S C 841(a)(1) and (b)(1)(C) (Count 1), possessing approximately 1 6 grams of marijuana, in violation of 21 U S C 844 (Count 2), possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U S C 924(c)(1)(A) (Count 3), being a felon in possession of a firearm, in violation of 18 U S C 922(g)(1), 924(a)(2) (Count 4), and related forfeiture counts J A 12a-16a

b On April 18, 2005, petitioner executed a written plea agreement "[p]ursuant to Fed R Crim P 11(c)(1)(C)," in which he agreed to plead guilty to all four counts J A 20a-33a Petitioner acknowledged "that the charges to which he w[ould] plead guilty carr[ied] a minimum term of imprisonment of five years, [and] a combined maximum term of imprisonment of life" J A 23a Petitioner agreed to forfeit property related to his offense, including the firearm he was carrying at the time of arrest J A 29a-30a In exchange for petitioner's guilty plea, the government agreed, *inter alia*, "that a sentence of 106 months' incarceration [was] the appropriate disposition of this case" J A 26a

Petitioner's conviction under Section 924(c) (Count 3) carried a mandatory consecutive 60-month sentence J A 27a With respect to the remaining counts, the plea agreement noted that petitioner's base offense level under the drug-quantity table, was 22 and that he was eligible for a three-level credit for acceptance of responsibility under Guidelines § 3E1 1(a) and (b) J A 27a, see

also J A 26a (government agreed to recommend reduction for acceptance of responsibility at sentencing) The agreement stated that petitioner's criminal history category under the Guidelines would be "determined upon completion of the presentence investigation," that the parties reserved the right to object to the calculation of petitioner's criminal history, and that the parties "anticipate[d] a Criminal History Category of IV " J A 27a-28a The agreement indicated petitioner's understanding that the district court would "independently calculate the Guidelines at sentencing," and petitioner "agree[d] to have his sentence determined pursuant to the Sentencing Guidelines " J A 28a

The agreement provided that if the district court "refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed R Crim P 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and defendant will be allowed to withdraw the plea of guilty " J.A 31a It further stated

> [Petitioner] agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors * * * [Petitioner] will not oppose imposition of a sentence incorporating the disposition provided for within this Agreement, nor argue for any other sentence If [petitioner] argues for any sentence other than the one to which he has agreed, he is in breach of this Agreement [Petitioner] agrees that the remedy for this breach is that the United States is relieved of its obligation under this Agreement, but [petitioner] may not withdraw his guilty plea because of his breach

J A 32a Petitioner also agreed to waive the right to appeal his sentence or "contest or collaterally attack" it "pursuant to 28 U S C § 2255 or otherwise " J A 28a

c On April 18, 2005, the district court accepted petitioner's guilty plea J A 36a-44a During the change-of-plea hearing, the prosecutor explained that the parties

> have entered into [a] plea agreement pursuant to [Rule] 11(c)(1)(C), and that's important to note because the parties have reviewed the sentencing guidelines as well as the statutory minimums that are at play in this issue, and we have agreed upon a recommended sentence that we will jointly provide to the Court And if the Court chooses not to accept our plea agreement or not to sentence within our agreement, then [petitioner] will have an opportunity to withdraw his guilty plea and go to trial

J A 41a The prosecutor further noted that, even though the parties anticipated that petitioner would be found to have a criminal history category of IV, "[t]here may be some issues with that" calculation, and petitioner had preserved "an opportunity to argue to the Court that his criminal history ought to be a [IV] " J A 43a The prosecutor stated that the parties "jointly recommend[ed]" a sentence of 106 months of imprisonment J A 44a Petitioner and his counsel both confirmed for the judge that the plea agreement called for a 106-month sentence *Ibid*

"After complying with Rule 11," the district court "accepted [petitioner's] plea of guilty," entering an order expressly stating that petitioner pleaded guilty "pursuant to a written Rule 11(c)(1)(C) plea agreement " J A 35a

d The presentence investigation report (PSR) calculated a base offense level of 22 under the drug-quantity table, Guidelines § 2D1 1(c) (2004), and a three-level reduction for acceptance of responsibility, which produced a total offense level of 19 J A 110a-113a

The PSR initially assigned petitioner nine criminal-history points based on eight scored prior convictions J A 113a-128a Those nine points were reduced to six pursuant to Guidelines § 4A1 1(c), which caps the number of one-point convictions at four J A 128a The PSR then added two points pursuant to Guidelines § 4A1 1(d), because petitioner committed the offense in this case while under a sentence of probation J A 128a Based on a total of eight countable criminal-history points, the PSR assigned petitioner a category IV criminal history, which yielded an advisory Guidelines range of 46 to 57 months of imprisonment, in addition to the 60-month mandatory consecutive sentence applicable to Count 3 J A 128a, 134a The PSR noted that "[a]s the plea agreement in this case is pursuant to Rule 11(c)(1)(C), should the court reject the terms of the plea agreement * * * , [petitioner] would be allowed to withdraw his guilty pleas " J A 134a

e On July 18, 2005, the district court sentenced petitioner J A 45a 51a At the sentencing hearing, petitioner's counsel informed the court

> We have no objections [to the PSR] This is a (C) plea where both the United States and the defense have agreed that a sentence of 106 months would be appropriate This is within the guideline, the advisory guideline range calculated by the probation officer The parties would ask the Court to accept the plea agreement

J A 47a The court sought confirmation that the parties' agreement called for a sentence of 106 months, to which petitioner's counsel responded "That's correct, your Honor That's the agreement of the parties " *Ibid* The court accepted the findings and Guidelines calculations in the PSR and then sentenced petitioner to 106 months of imprisonment, to be followed by five years of supervised release J A 47a-49a The judgment imposed an assessment of $400, but waived the relevant fine and costs of incarceration "due to [petitioner's] inability to pay " J A 59a The judgment stated that petitioner pleaded guilty "pursuant to a Rule [11](c)(1)(C) plea agreement " J A 52a (emphasis omitted)

3 Two years after petitioner's sentence became final, the Sentencing Commission reduced the base offense levels for crack cocaine by two levels and made that amendment retroactively applicable to sentences that had been previously imposed See p 6, *supra* In a general order entered on February 20, 2008, the Chief Judge of the United States District Court for the Western District of Kentucky provided a procedure for reviewing the sentences of "currently-incarcerated individuals that may be subject to reduction" in light of those amendments See W D Ky Gen Order No 2008-01, http //www kywd uscourts gov/pdf/General Order_2008-01 pdf

On June 5, 2008, pursuant to that order, the district court directed the Probation Office to prepare a Memorandum of Recalculation in petitioner's case addressing whether Amendment 706 resulted in a lower Guidelines range, ordered the parties to file any objections to that memorandum, and appointed counsel to represent petitioner J A 60a-62a On August 8, 2008, the Probation Office filed an Amended Memorandum of Recalculation,

in which it determined that the 2007 crack-cocaine amendments resulted in a lower base offense level, a lower adjusted offense level, and a lower advisory Guidelines range than those that it had calculated for the 2005 sentencing J A 149a-150a The new Guideline Imprisonment Range was 37 to 46 months, J A 150a—which, after the addition of the mandatory consecutive sentence of 60 months for the Section 924(c) count, resulted in a range of 97 to 106 months Nevertheless, the Probation Office concluded that, because "the original sentence was imposed under the terms of a binding Rule 11(c)(1)(C) agreement," no sentence reduction was "authorized " J A 150a-151a [4]

Petitioner filed a written objection, contending in relevant part that a reduction was authorized because "the advisory sentencing ranges for crack cocaine offenses in effect at the time of [his] sentencing most certainly were used—at least in part—to determine his sentence " J A 158a Petitioner noted that the parties had selected the bottom of his then-applicable advisory Guidelines range when they had agreed on a sentence of 106 months of imprisonment, and that the court had considered that range in deciding to accept the plea agreement *Ibid*

On December 31, 2008, the district court denied petitioner's request for a sentence reduction J A 66a-69a The court found that petitioner's "sentence was not based upon a guideline calculation, but rather the 106 months was agreed upon by the parties pursuant to Rule

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[4] An earlier Memorandum of Recalculation, filed on May 8, 2008, did not acknowledge the Rule 11(c)(1)(C) basis for petitioner's guilty plea It thus indicated that petitioner was eligible for a sentence reduction and that, absent an objection by either party, the district court could reduce petitioner's sentence to 97 months J A 143a-144a

11(c)(1)(C)," in an "agreement 'bind[ing] both the parties and the court '" J A 68a-69a (quoting *United States* v *Peveler*, 359 F 3d 369, 378 (6th Cir), cert denied, 542 U S 911 (2004)) In light of its finding that "Amendment 706 has no effect on [petitioner's] sentence," the court held it could not reduce that sentence J A 69a

4 Petitioner appealed the denial of his request for a sentence reduction The court of appeals consolidated petitioner's appeal with that of another defendant, Antonio Goins, who had also been denied a reduction under Section 3582(c)(2) in light of a Rule 11(c)(1)(C) plea agreement to a specific sentence The court affirmed the judgments in both cases J A 70a-92a

The court of appeals held that its prior decision in *Peveler* "preclude[d] resentencing" in both cases J A 73a As the court explained, *Peveler* "held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement " *Ibid* In so holding, *Peveler* had relied on the Tenth Circuit's reasoning in *United States* v *Trujeque*, 100 F 3d 869 (1996), that such a "defendant's sentence [i]s not actually calculated under the guidelines, but [i]s determined by the Rule 11([c])(1)(C) plea agreement," *Peveler*, 359 F 3d at 378 (citing *Trujeque*, 100 F 3d at 871), and had also recognized that a type C agreement "binds both the parties and the court," *ibid*

The court of appeals noted that *Peveler* did "not preclude reducing the sentence of a defendant who ple[aded] under Rule 11(c)(1)(C) where resentencing is necessary to avoid a miscarriage of justice," but it concluded that "neither Goins nor [petitioner] falls within that exception " J A 74a Petitioner's "original 106-

month sentence remained inside the Guidelines range for his crime, even after the amendment" to the crack-cocaine Guidelines, which was "a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing" J A 75a (citing *Peveler*, 359 F 3d at 379 n 4) [5]

In a concurring opinion (J A 76a-92a), Judge White stated that "*Peveler* construes 18 U S C § 3582(c)(2) more narrowly than Congress intended" J A 76a In her view, "[n]othing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements" J A 83a According to Judge White, "[w]hen faced with a § 3582[(c)](2) motion in the context of a Rule 11(c)(1)(C) agreement, the court should be able to evaluate the agreement and the surrounding circumstances to determine whether the sentence was based at least in part on a subsequently reduced Guidelines range, and if so, whether and to what extent it should be reduced" J A 88a-89a "Were it not for *Peveler*," Judge White would have remanded both cases "with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate" J A 92a

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[5] As to Goins, the court of appeals explained that his agreed-upon sentence (168 months) exceeded his pre-amendment range (138 to 157 months) J A 74a The court further explained that Goins had "entered into a carefully constructed agreement in which the parties balanced many factors—including the charges to which Goins would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which Goins would be held responsible" *Ibid* Because "[n]othing in th[e] record suggest[ed] that declining to resentence Goins work[ed] any injustice," the court concluded that "[t]he district court did not err by holding Goins to the bargain he made" J A 75a

On January 12, 2010, the court of appeals denied petitions for rehearing en banc filed by petitioner and Goins. J.A. 93a-94a.

SUMMARY OF ARGUMENT

A defendant who pleads guilty in exchange for a specific sentence or sentencing range pursuant to an agreement entered into under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because such a sentence is not "based on" a subsequently lowered Guidelines range.

A. Finality is an important attribute of criminal judgments. Section 3582(c)(2) represents a narrow exception to the general rule of sentence finality by permitting a district court to "reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment *based on* a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2) (emphasis added).

B. A defendant who pleads guilty pursuant to a specific-sentence agreement under Rule 11(c)(1)(C) does not satisfy the condition precedent for Section 3582(c)(2) relief. A sentence is not "based on" whatever ultimately led to its imposition, but is, more logically, based on the element that was of binding legal consequence in its imposition—that which entitled the defendant to receive the specific sentence he had negotiated with the government. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993). When a defendant pleads guilty pursuant to Rule 11(c)(1)(C), the parties' sentencing agreement binds the district court once it accepts the plea agreement, whether or not the stipulated sentence or sentencing range correlates to the defendant's applicable Guide-

lines range. The court, therefore, imposes sentence "based on" the plea agreement, not on the defendant's Guidelines range.

That reading is consistent with the Sentencing Commission's implementation of Section 3582(c)(2). The policy statement in Guidelines § 1B1.10(b)(1)—the terms of which must be satisfied before a district court may exercise discretion to reduce a previously imposed sentence—allows a reduction only to account for a guideline provision that was "applied when the defendant was sentenced." But when a defendant is sentenced pursuant to a Rule 11(c)(1)(C) agreement to a specific sentence, the Guidelines are not "applied" at sentencing with respect to that component of the sentence.

The absence of an express prohibition on future sentence reductions in Rule 11(c)(1)(C) does not alter that conclusion. The language of Section 3582(c)(2) focuses on the basis for the original sentence. When Congress enacted Section 3582(c)(2), type C agreements were already treated as binding on courts, because Congress is presumed to understand the state of the law when it legislates, its decision to limit Section 3582(c)(2) to sentences that were "based on" a subsequently lowered Guidelines range was significant.

Nor does the parties' and the district court's consultation of the Guidelines during the plea and sentencing process mean that a specific sentence in a Rule 11(c)(1)(C) plea agreement is "based on" the Guidelines for purposes of Section 3582(c)(2). The Guidelines will typically inform the parties' negotiation of a plea agreement, and the district court generally will (and should) consider the Guidelines in deciding whether to accept the plea agreement in the first instance. See Guidelines § 6B1.2(c), p.s. But the court may accept an agreement

even if its stipulated sentence falls outside the defendant's likely Guidelines range. It is the parties' agreement, once accepted, that provides the basis for the sentence.

The district court and the court of appeals, therefore, were correct to conclude that petitioner is not eligible for a sentence reduction as a result of the Sentencing Commission's 2007 crack-cocaine Guidelines amendments. The plea and sentencing records leave no doubt that petitioner pleaded guilty in exchange for a 106-month sentence pursuant to an agreement under Rule 11(c)(1)(C). Because the district court accepted the plea agreement, that agreement was the basis for petitioner's sentence.

C. Plea agreements are an essential component of the administration of justice and result from the mutual advantage to the defendant and the government in resolving a case without trial. The government often agrees to give up the right to seek a higher sentence or agrees to dismiss some charges in exchange for a defendant's agreement to a fixed sentence. Construing Section 3582(c)(2) to preclude a Rule 11(c)(1)(C) defendant from obtaining a sentence reduction preserves the contractual bargain struck by the parties in their plea agreement and prevents the defendant from obtaining an additional and unwarranted sentencing benefit at the government's expense.

In this case, petitioner benefitted from his plea agreement because he obtained the certainty of a 106-month sentence in the face of a lengthy criminal record that, in the absence of his plea agreement, could have resulted in a greater sentence. The terms of the parties' binding agreement would be negated if petitioner were now to receive a sentence reduction.

Recognizing the binding effect of an agreement in determining Section 3582(c)(2) eligibility does not mean that either the agreement or Rule 11(c)(1)(C) trumps the statute. Rather, the binding nature of type C agreements gives content to the statutory inquiry into whether the sentence was "based on" a subsequently lowered Guidelines range. The waiver principles on which petitioner extensively relies are therefore inapposite. Because a Rule 11(c)(1)(C) defendant's sentence is "based on" his plea agreement, no waivable right under Section 3582(c)(2) exists in the first place. Conversely, the absence of similar language in Section 3582(c)(1) and Rule 35(b) of the Federal Rules of Criminal Procedure means that a Rule 11(c)(1)(C) defendant may still receive a sentence reduction under those provisions. Moreover, such reductions are (unlike those under Section 3582(c)(2)) sought by the government rather than the defendant.

The benefits obtained by a defendant who pleads guilty pursuant to a type C agreement will often be equivalent to, or even exceed, the sentence reduction he could receive under Section 3582(c)(2). A defendant assumes the risk of a favorable change in the law when he pleads guilty. Thus, construing Section 3582(c)(2) to preclude sentence reductions for a defendant who pleaded guilty in exchange for a specific sentence or sentencing range appropriately preserves the terms of the parties' bargain and works no injustice.

ARGUMENT

A DEFENDANT WHO PLEADS GUILTY IN EXCHANGE FOR A SPECIFIC SENTENCE PURSUANT TO A RULE 11(c)(1)(C) AGREEMENT IS NOT ELIGIBLE FOR A SENTENCE REDUCTION UNDER 18 U S C 3582(c)(2) BECAUSE THE SENTENCE IS NOT "BASED ON" A GUIDELINES RANGE

A Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

As this Court has repeatedly recognized, finality is an "essential to the operation of our criminal justice system" *Teague* v *Lane*, 489 U S 288, 309 (1989) (plurality opinion), see *United States* v *Frady*, 456 U S 152, 166 (1982) ("[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments") Once a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as Congress allows See, *e g* , *United States* v *Addonizio*, 442 U S 178, 189 & n 16 (1979)

Consistent with those principles, Congress has provided that a court generally "may not modify a term of imprisonment once it has been imposed" 18 U S C 3582(c) That command is subject to three narrow exceptions, collectively designed to serve as "safety valves" for prisoners serving already-imposed sentences S Rep No 225, 98th Cong , 1st Sess 121 (1983) (*1983 Senate Report*) The exception at issue in this case provides that a court "may reduce the term of imprisonment" of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission"

18 U S C 3582(c)(2) [6] Before granting such a reduction, the court must consider the statutory sentencing factors set out in 18 U S C 3553(a) "to the extent that they are applicable " 18 U S C 3582(c)(2) The statute also instructs that such a reduction cannot be granted unless it "is consistent with applicable policy statements issued by the Sentencing Commission " *Ibid* As the Court observed in *Dillon* v *United States*, 130 S Ct 2683 (2010) "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding " *Id* at 2691 As a result, Section 3582(c)(2) "permits" a court to reduce a sentence only "within the narrow bounds established by the [Sentencing] Commission " *Id* at 2694

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[6] The other two exceptions are contained in 18 U S C 3582(c)(1) and must be initiated by the government Under one of those exceptions, a court may reduce an imposed term of imprisonment on the motion of the Director of the Bureau of Prisons, if "extraordinary and compelling reasons warrant such a reduction" or the defendant is, *inter alia*, at least 70 years old and has served at least 30 years in prison, provided that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission " 18 U S C 3582(c)(1)(A) That exception applies "to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner " *1983 Senate Report* 121

Under the other exception, a court may "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure " 18 U S C 3582(c)(1)(B) Rule 35, among other things, permits a district court, on the government's motion, to reduce a sentence if, after sentencing, the defendant "provided substantial assistance in investigating or prosecuting another person " Fed R Crim P 35(b)(1)

B A Defendant Who Pleads Guilty In Exchange For A Specific Sentence Pursuant To A Rule 11(c)(1)(C) Plea Agreement Is Not Sentenced "Based On" A Guidelines Range

The exception to sentence finality in Section 3582(c)(2) does not apply to a defendant who pleaded guilty in exchange for a specific sentence or sentencing range pursuant to a Rule 11(c)(1)(C) plea agreement That conclusion is dictated by the plain language of Section 3582(c)(2) and the nature of that kind of plea agreement Once a court accepts a plea agreement under Rule 11(c)(1)(C), it is bound by the parties' stipulation of a particular sentence or sentencing range As a result, in such a case, the court imposes a sentence "based on" the parties' agreement—not on any advisory Guidelines range that might otherwise apply

Petitioner's contrary view has been adopted by only a single federal court of appeals [7] The great majority of the circuits to have considered the question have held that Section 3582(c)(2) generally does not permit a district court to reduce a sentence that was imposed pursuant to a Rule 11(c)(1)(C) plea agreement [8]

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[7] See *United States* v *Cobb*, 584 F 3d 979, 984 (10th Cir 2009) ("[N]othing in the language of § 3582(c)(2) or language of Rule 11 precludes a defendant who pleads guilty under Rule 11 [in exchange for a specific sentence] from later benefitting from a favorable retroactive guideline adjustment "), cf *United States* v *Dews*, 551 F 3d 204, 209-212 (4th Cir 2008) (panel opinion adopting similar view), vacated on grant of reh'g en banc, No 08-6458 (4th Cir Feb 20, 2009), dismissed as moot (4th Cir May 4, 2009)

[8] See *United States* v *Rivera-Martinez*, 607 F 3d 283, 286-287 (1st Cir 2010), petition for cert pending, No 10-113 (filed July 19, 2010), *United States* v *Main*, 579 F 3d 200, 203-204 (2d Cir 2009), cert denied, 130 S Ct 1106 (2010), *United States* v *Sanchez*, 562 F 3d 275,

1 A sentence is "based on" a Guidelines range only when that range is of legal consequence to the sentence's validity

"When interpreting a statute," the Court "give[s] words their ordinary or natural meaning." *Pasquantino* v *United States*, 544 U S 349, 356 (2005) (quoting *Leocal* v *Ashcroft*, 543 U S 1, 9 (2004)), see also, *e g*, *Flores-Figueroa* v *United States*, 129 S Ct 1886, 1891

279-282 (3d Cir 2009), cert denied, 130 S Ct 1053 (2010), *United States* v *Pevzler*, 359 F 3d 369, 378-379 (6th Cir), cert denied, 542 U S 911 (2004), *United States* v *Franklin*, 600 F 3d 893, 896 (7th Cir 2010), *United States* v *Scurlark*, 560 F 3d 839, 841-842 (8th Cir), cert denied, 130 S Ct 738 (2009), cf *United States* v *Bride*, 581 F 3d 888, 890-891 (9th Cir 2009) (defendant ineligible for Section 3582(c)(2) relief where Rule 11(c)(1)(C) plea agreement provided for sentence below Guidelines range as calculated by district court), cert denied, 130 S Ct 1160 (2010), see also *United States* v *Berry*, 618 F 3d 13, 17 (D C Cir 2010) (reserving question of "in what circumstances, if any, a defendant who enters a Rule 11(e)(1)(C) plea agreement is sentenced 'based on' a particular sentencing range"), *id* at 19 (Rogers, J , concurring in judgment) (concluding that defendant was not sentenced "based on" a Guidelines range "where the district court has calculated a guideline sentencing range and then departed from it and imposed a sentence based on the term of imprisonment set forth in the plea agreement") The First and Seventh Circuits have held open the possibility of a reduction when a plea agreement "contains an express statement," *Rivera-Martinez*, 607 F 3d at 287, or "*clearly* reflect[s]" the intent of the parties, *United States* v *Ray*, 598 F 3d 407, 409 (7th Cir 2010), to tie the stipulated sentence to a Guidelines calculation affected by the retroactive amendment The Sixth Circuit has articulated an exception when a reduction would be necessary to avoid a miscarriage of justice, see *Pevzler*, 359 F 3d at 378 n 4 The Fifth Circuit has held, in a case where a type-C agreement established a minimum sentence but left the ultimate sentence to the district court, that the defendant was eligible for a reduction under Section 3582(c)(2) as long as it did not go below the agreement's stipulated minimum *United States* v *Garcia*, 606 F 3d 209, 210-214 (2010)

(2009) (noting that "courts ordinarily interpret criminal statutes" in a manner "fully consistent with * * * ordinary English usage"). As relevant here, the verb phrase to "base on" or to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something: basic principle." *Webster's Third New International Dictionary of the English Language* 180 (1981) (definition 2 of verb "base", definition 3a of noun "base"), see *The American Heritage Dictionary of the English Language* 148 (4th ed. 2006) (definition 4 of noun "base": "[t]he fundamental principle or underlying concept of a system or theory"), 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (definition 2.a. of noun "base": "*[f]ig[urative]* Fundamental principle, foundation, groundwork", sense II of noun "base": "The main or most important element or ingredient, looked upon as its fundamental part"), *Webster's New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a. of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent").

As petitioner recognizes (Br. 16), this Court construed the phrase "based upon" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993). That case, however, does not support petitioner's expansive reading of "based on" for purposes of Section 3582(c)(2). In *Nelson*, the Court considered a clause in the Foreign Sovereign Immunities Act of 1976 permitting suit against a foreign state when "the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2). The plaintiffs were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband, allegedly in retaliation for his reporting

safety hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants 507 U S at 352-354

With respect to the requirement that the plaintiffs' action be "based upon" commercial activity in the United States, the Court stated

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assurance, guidance is hardly necessary In denoting conduct that forms the "basis," or "foundation," for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case

Nelson, 507 U S at 357 (internal citations omitted) Applying that "most natural[]" reading of the phrase, the Court rejected the plaintiffs' argument that their suit was "based upon" the defendants' activities in recruiting and employing the husband and also upon their later wrongful acts It was not enough that the recruiting and hiring activities were "connect[ed] with" or "led to the conduct that eventually injured [the plaintiffs]" *Id* at 358 Instead, the Court held that the plaintiffs' suit was exclusively "based upon" the tortious acts committed in Saudi Arabia, and not upon recruiting and hiring "activities that preceded the[] [torts'] commission" *Ibid* As the Court explained, the suit could not be "based upon" the defendants' earlier activities because "those facts alone entitle the [plaintiffs] to nothing" *Ibid*

The Court's discussion in *Nelson* establishes that a claim is not "based on" something simply because it is a but-for cause or because it "led to" the critical or consequential act 507 U S at 354, 358 Instead, consistent

with the definitions quoted above, a claim is "based on" its "fundamental" or "most important" elements—those that actually entitle the plaintiff to something. See *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1288 (3d Cir. 1993) ("The Court [in *Nelson*] interpreted the term 'based upon' to require the plaintiff's lawsuit to involve a claim that *materially results* from conduct that constitutes the defendant's commercial activity in the United States.") (emphasis added), cert. denied, 511 U.S. 1107 (1994).

Reading the phrase "based on" to refer to that which is legally binding is consistent with *Nelson* and the dictionary definitions quoted above, but those sources lend scant support to petitioner's permissive construction, which extends, in his words, to something that is merely a "point of development" or "the starting point and material benchmark" for negotiations that later lead to an agreement. Pet. Br. 17, 31.

Petitioner's view also contradicts the construction of "based on" that courts have adopted in a closely analogous context involving the ability to revisit an earlier civil judgment. Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a district court may provide relief from a final judgment when that judgment "is based on an earlier judgment that has been reversed or vacated." Courts have consistently recognized the narrow nature of that authorization, concluding that it "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion. It does not apply merely because a case relied on as precedent * * * has since been reversed." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 335 (2d ed. 1995) (citing cases); see

also, *e g* , *Manzanares* v *City of Albuquerque*, No 10-2011, 2010 WL 5116912, at *2 (10th Cir Dec 16, 2010) [9]

Thus, in the context of Section 3582(e), a sentence is not properly said to be "based on" whatever ultimately "led to" its imposition (*Nelson*, 507 U S at 358), but is, more narrowly, based on the element that was of binding legal consequence in its imposition—that which "entitle[d]" the defendant (*ibid*) to the particular sentence

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[9] In other contexts—not involving the potential modification of a civil or criminal judgment—courts have construed "based on" in a range of ways For example, in the context of a Clean Air Act provision requiring an attainment demonstration to be "based on photochemical grid modeling," 42 U S C 7511a(c)(2)(A), courts have found the phrase "based on" to be ambiguous but have upheld as reasonable the EPA's conclusion that a demonstration is "based on the grid model" when the model's "results form[ed] the principal component of the analysis" and those results were "adjust[ed] * * * with supplemental information " *Environmental Def* v *United States EPA*, 369 F 3d 193, 204-205 (2d Cir 2004), accord *Sierra Club* v *EPA*, 356 F 3d 296, 305-306 (D C Cir 2004) In the context of a since-amended provision of the False Claims Act that precluded jurisdiction over a *qui tam* action "based upon the public disclosure of allegations," 31 U S C 3730(e)(4)(A) (2006) (amended 2010), the courts of appeals divided about the meaning of the phrase "based upon," with the majority holding that "as long as the relator's allegations are substantially similar to information disclosed publicly, the relator's claim is 'based upon' the public disclosure even if he actually obtained his information from a different source," and the minority "requiring proof that the relator's allegations are actually derived from the publicly disclosed information " *United States ex rel Ondis* v *City of Woonsocket*, 587 F 3d 49, 57 (1st Cir 2009) (citing cases) In the context of a reference in the Tariff Schedules of the United States to an "[a]pparatus based on the use of radiations from radioactive substances," the U S Court of Customs and Patent Appeals concluded that the "plain meaning" of Congress's use of "the 'based on' language" was limited to "goods in which the use of radiation is *a fundamental and essential component* " *United States* v *Siemens Am , Inc* , 653 F 2d 471, 474, 476 (1981), cert denied, 454 U S 1150 (1982) (emphasis added)

In many cases, sentences are indeed "based on" the advisory Guidelines ranges that sentencing judges applied when they imposed those sentences. But, as discussed below, that is not true when a sentence is the direct product of the parties' agreement to a specific sentence, as provided for in Rule 11(c)(1)(C), rather than an application of the Guidelines.

2. The sentence of a defendant who pleads guilty under Rule 11(c)(1)(C) is the legal consequence of the plea agreement, not of any Guidelines range

When a defendant pleads guilty in exchange for a specific sentence pursuant to Rule 11(c)(1)(C), his sentence is the legal consequence of the parties' agreement on a specific sentence or sentencing range because, once accepted, that agreement—not the Sentencing Guidelines—is what binds the district court to impose the sentence. Accordingly, such a defendant's sentence is "based on" the plea agreement rather than any Guidelines range.

a. Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) further provides that "[i]f the court accepts the plea agreement, * * * the agreed disposition will be included in the judgment." The district court thus has no authority to modify the parties' sentencing agreement once it accepts that kind of plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (c)(3)(A) and (c)(4); see, *e.g.*, *United States* v. *Rivera-Martinez*, 607 F.3d 283, 286 (1st Cir. 2010) ("Once the district court accepts a C-type plea

agreement, the court is obliged to sentence the defendant in strict conformity with the terms of the agreement"), petition for cert. pending, No. 10-113 (filed July 19, 2010), *United States* v. *Pacheco-Navarette*, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements"), cert. denied, 549 U.S. 892 (2006). Unlike, for example, plea agreements under Rule 11(b)(1)(B), in which the government agrees to make a non-binding sentence recommendation or agrees not to oppose a defendant's sentencing request, the parties' stipulation to a specific sentence or sentencing range in a type C agreement is so critical that the defendant may withdraw his guilty plea if the court does not accept the parties' sentencing stipulation. See Fed. R. Crim. P. 11(c)(5)(B); see also Fed. R. Crim. P. 11 advisory committee's note (1979 Amendment) ("critical to a type * * * (C) agreement is that the defendant receive the * * * agreed-to sentence"). Accordingly, where the parties have agreed on a sentence or sentencing range in a Rule 11(c)(1)(C) plea agreement, that agreement is the legal determinant of the sentence, regardless of whether the sentence correlates with what would have been the applicable Guidelines range.

b. Petitioner contends (Br. 25-26) that "Rule 11(c)(1)(C) contains no hint of a prohibition on future sentence reductions under § 3582(c)(2)," because it requires only that the court initially "*impose* a sentence according to the parties' recommendation." But the predicate for a reduction under Section 3582(c)(2)—*i.e.*, whether the defendant's sentence was "based on" a subsequently lowered Guidelines range—focuses on what happened at the original sentencing. The absence of a

provision in Rule 11(e)(1)(C) regarding *future* sentence reductions is not relevant to that analysis

When Congress enacted the SRA in 1984, Rule 11 already provided that, if a district court rejects a type C agreement, it must "afford the defendant the opportunity to then withdraw the plea," Fed R Crim P 11(e)(4) (1984), and, "[i]f the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement," Fed R Crim P 11(e)(3) (1984) At that time, courts generally treated the sentencing disposition provided for in type C agreements as binding once the district court accepted the agreement See, *e g*, *United States* v *French*, 719 F 2d 387, 389 & n 2 (11th Cir 1983), cert denied, 466 U S 960 (1984), *United States* v *Thompson*, 680 F 2d 1145, 1150 (7th Cir), cert denied, 459 U S 1089 (1982), and 459 U S 1108 (1983), *United States* v *Stevens*, 548 F 2d 1360, 1362 (9th Cir), cert denied, 430 U S 975 (1977), see also Pet Br 17 n 3 In light of the "well-settled presumption that Congress understands the state of existing law when it legislates," *Bowen* v *Massachusetts*, 487 U S 879, 896 (1988), Congress knew when it enacted Section 3582(c)(2) that a court would be required to impose the sentence to which the parties had stipulated (unless the court had rejected the agreement and given the defendant an opportunity to withdraw the plea)

Congress could have written Section 3582(c)(2) to cover defendants who agreed to specific sentences under Rule 11(e)(1)(C) For example, it could have made Section 3582(c)(2) applicable to any "defendant whose underlying sentencing range was subsequently lowered by the Sentencing Commission, whether or not that range was applied at sentencing " Congress instead limited

sentence reductions to sentences "based on" a Guidelines range that was later amended. That choice is significant given Congress's knowledge that a stipulated sentence—regardless of whether it corresponds to or departs from what would otherwise have been the relevant Guidelines range—binds the sentencing court once it accepts a plea agreement under Rule 11(c)(1)(C).[10]

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[10] The only provision in the United States Code that mentions Rule 11(c)(1)(C) plea agreements is 18 U.S.C. 3742, which prescribes when a sentence can be reviewed on appeal. Section 3742 generally permits an appeal to be brought when a sentence is greater than or less than "the sentence specified in the applicable guideline range," 18 U.S.C. 3742(a)(3) and (b)(3), or when a sentence is "plainly unreasonable" and there is "no sentencing guideline" for the offense, 18 U.S.C. 3742(a)(4) and (b)(4). But both of those kinds of appeals are expressly foreclosed "[i]n the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure" unless the sentence is also different from "the sentence set forth in such agreement." 18 U.S.C. 3742(c)(1) and (2), see note 1, *supra* (explaining that the substance of Rule 11(c)(1)(C) used to be located at (e)(1)(C)). Although Section 3742(c), which addresses type C plea agreements, does not also limit the ability to bring an appeal on the separate ground that a sentence "was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(a)(2) and (b)(2), such a limitation was unnecessary because the sentence in such a case is the result of the parties' agreement, which binds the district court, and not of any "application" of the Guidelines at the time of sentencing. Thus, the legislative history recognizes that, although Section 3742 "create[d] for the first time a comprehensive system of [appellate] review of sentences," it did not change the fundamental proposition that "[o]f course, a sentence consistent with a plea agreement cannot be appealed." *1983 Senate Report* 153, 155. Moreover, even if the sentence specified in a Rule 11(c)(1)(C) agreement and then imposed by a court could somehow be said to be the result of an "application" of the Guidelines, petitioner still could not claim that his sentence was imposed as a result of an "incorrect" application of the Guidelines, because the sentencing court correctly applied the drug-quantity Guideline that was applicable when his sentence was imposed in 2005, and this Court has explained that the

c Petitioner's more capacious reading of Section 3582(c)(2) is also inconsistent with the Sentencing Commission's implementation of that statute As *Dillon* explained, Section 3582(c)(2) requires a district court evaluating a request to reduce a sentence "to follow the Commission's instructions in § 1B1 10 to determine the prisoner's eligibility for a sentence modification " 130 S Ct at 2691, see 18 U S C 3582(c)(2) (requiring any sentence reduction to be "consistent with applicable policy statements issued by the Sentencing Commission") Under those instructions, a court is permitted to "substitute only" those retroactively amended provisions that "correspond[ ]" to the "guideline provisions that were *applied when the defendant was sentenced*," and the court must "leave all other guideline application decisions unaffected " *Ibid* (quoting Guidelines § 1B1 10(b)(1), p s) (emphasis added) In other words, the Commission has plainly stated that the sentence-modification power extends only to the parts of the Guidelines that "were applied when the defendant was sentenced "

When a defendant is sentenced pursuant to a type C plea agreement to a specific sentence, however, there is no "appli[cation]" of the Guidelines at the time of sentencing with respect to that component of the sentence By the time the sentencing occurs (*i e* , the time that is relevant under Guidelines § 1B1 10(b)(1)), the district court has already accepted the plea agreement The court does not "appl[y]" the Guidelines at that point but instead imposes the specific sentence to which the parties had agreed—because that sentence, by the express

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court's later refusal to reduce petitioner's sentence under Section 3582(c)(2) did not involve a "sentencing or resentencing," but only the possibility of "a limited adjustment to an otherwise final sentence" that had been previously imposed *Dillon*, 130 S Ct at 2690-2691

terms of Rule 11(c)(1)(C), "binds the court" after it accepts the guilty plea Although petitioner repeatedly discusses whether his 106-month sentence was "based on" the Guidelines, he does not (and could not plausibly) argue that the later-amended crack guideline was actually "applied when [he] was sentenced " Guidelines § 1B1 10, the terms of which must be satisfied before a district court may exercise discretion to reduce a previously imposed sentence, requires there to have been such an application

d Petitioner is, accordingly, misguided in focusing on (Br 21) the concededly strong likelihood that the parties will have calculated and considered potential Guidelines ranges in the course of negotiating a plea agreement and selecting a specific sentence or sentencing range that the district court will be bound to apply The defendant and the government will typically consult the Sentencing Guidelines to inform their plea negotiations See Guidelines Ch 1, Pt A, Subpt 1, intro comment (n 4(c)) (noting that the prosecutor and defense attorney do not "work in the dark" when they explore "the possibility of a negotiated plea" because "the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place") But, as the Third Circuit has explained, the parties' "background negotiations" are not relevant to answering "what is the sentence based on" because "the answer depends on what happened in court", the language of Section 3582(c)(2) focuses on what the district court "considered in sentencing the defendant," and, in the context of a binding agreement under Rule 11(c)(1)(C), the court considers the parties' stipulated sentence or sentencing range *United States* v *Sanchez*, 562 F 3d 275, 282 (2009), cert denied, 130 S Ct 1053 (2010)

Although a district court generally considers the applicable Guidelines range in determining whether to accept a Rule 11(c)(1)(C) plea agreement, see Guidelines § 6B1 2(c), p s , and in imposing a sentence, see 18 U S C 3553(a)(4), that does not mean that the defendant is sentenced "based on" the Guidelines range See *Rivera-Martínez*, 607 F 3d at 286 ("It is common practice that, in determining whether to accept or reject the sentence proposed in a C-type plea agreement, a district court will use the guidelines as a point of comparison But taking such a precautionary step does not transmogrify an agreement-based sentence into one based on the guidelines "), *United States* v *Cieslowski*, 410 F 3d 353, 364 (7th Cir 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea "), cert denied, 546 U S 1097 (2006), see also *United States* v *Cobb*, 584 F 3d 979, 987 (10th Cir 2009) (Hartz, J , dissenting) (noting that "it will be a rare sentence indeed that is arrived at without any of the essential parties taking the guidelines into consideration") The court may choose to accept a sentence or range specified by the parties' agreement, even if the sentence or range diverges from the court's calculation of the applicable Guidelines range See Guidelines § 6B1 2(c), p s , see also *United States* v *Bernard*, 373 F 3d 339, 343-347 (3d Cir 2004) (rejecting defendant's challenge to correctness of stipulated Guidelines range in type C agreement because district court was under obligation to apply stipulated Guidelines provision once it accepted agreement) The sentence, in short, is not the legal consequence of the defendant's Guidelines range See *Nelson*, 507 U S at 357 It is the parties'

agreement to the particular sentence or range, once accepted, that becomes the basis for that aspect of the sentence

e The parties' agreement to a specific sentence or range under Rule 11(c)(1)(C) will prevent that aspect of the sentence from being "based on" a Guidelines range, but there are two general exceptions to that conclusion First, Rule 11(c)(1)(C) contemplates not only that the parties may agree on a "specific sentence" but also that they may agree that "a particular provision of the Sentencing Guidelines * * * does or does not apply " An agreement that a Guidelines provision *does* apply, without any accompanying agreement to a specific sentence, would not preclude the resulting sentence from being "based (in part) on" that Guidelines provision Second, when the parties agree upon a "specific sentence," their agreement may address only some aspects of the sentence, and thus will not bind the district court with respect to aspects that it does not address For instance, the parties may stipulate (as they did here) to a particular term of imprisonment, but not also stipulate to such items as the length and conditions of any term of supervised release, or to restitution, fines, assessments, and forfeitures In the absence of agreements binding the sentencing court with respect to such items, the court would apply the relevant advisory Guidelines provisions See Guidelines §§ 5D1 1, 5D1 2, 5D1 3, 5E1 1, 5E1 2, 5E1 3, 5E1 4 [11]

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[11] Although it would be fair to say that the non-imprisonment aspects of the sentence that were not the subject of a Rule 11(c)(1)(C) agreement were indeed "based on" the Guidelines, that would not affect eligibility for a sentence reduction under Section 3582(c)(2) Under the statute and the Commission's policy statement, with one limited exception, the only aspect of a sentence that can be reduced on the basis of a

3 Petitioner's term of imprisonment was "based on" his plea agreement, not on a Guidelines range

a Petitioner contends (Br 21) that his term of imprisonment was "based on" on the drug-quantity range prescribed by the Sentencing Guidelines because "the subsequently lowered guideline range was the very foundation of the plea agreement, the court's acceptance of that agreement, and the sentence imposed "[12] In fact, the plea agreement, the plea transcript, the PSR, the sentencing transcript, and the judgment confirm that petitioner's term of imprisonment was based on his plea agreement, not on a Guidelines range

The plea agreement states that it was executed "[p]ursuant to Fed R Crim P 11(c)(1)(C)" and that the government "agree[s] that a sentence of 106 months' incarceration is the appropriate disposition of this case " J A 20a, 26a It further states that, if the district court

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retroactively applicable Guidelines amendment is the "term of imprisonment " 18 U S C 3582(c)(2), Guidelines § 1B1 10(a)(1) and (b), p s The limited exception is that, in some circumstances, the court may, in light of an amended guideline range, be able to consider "early termination of a term of supervised release " *Id* § 1B1 10, comment (n 4(B))

[12] Petitioner claims to offer a "case-by-case" approach to determining a Rule 11(c)(1)(C) defendant's eligibility for Section 3582(c)(2) relief Pet Br 11, 22, 30, 33 In practice, however, his approach is even more categorical than the government's His reading of "based on" would sweep in "*all* sentencing decisions," because, he claims, in "actual practice," the Guidelines are "the starting point and initial benchmark for plea negotiations " *Id* at 30-31 (emphasis added) Although he says at one point that "not every sentence reflected in a C plea agreement is 'based on' the applicable guideline range," *id* at 33, he provides no instance in which he acknowledges that that would be true under his elastic reading of "based on " Rather, he specifically contends that a sentence "below the guideline range can be 'based on' the guideline range " *Id* at 32

"refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed R Crim P 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and [petitioner] will be allowed to withdraw the plea of guilty" J A 31a [13]

At the change-of-plea hearing, the prosecutor noted it was "important" that the plea agreement had been entered into pursuant to Rule 11(c)(1)(C), and, as confirmed by petitioner and his counsel, stated that the parties had agreed upon a 106-month sentence J A 41a, 43a-44a The district court's order stated that petitioner had pleaded guilty "pursuant to a written Rule 11(c)(1)(C) plea agreement" J A 35a

The PSR, after calculating petitioner's Guidelines range, stated that "[a]s the plea agreement in this case is pursuant to Rule 11(c)(1)(C), should the court reject the terms of the plea agreement * * *, [petitioner] would be allowed to withdraw his guilty pleas" J A

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[13] Petitioner briefly suggests (Br 26 n 7) that his "plea agreement is ambiguous as to whether it was actually binding on the court" But petitioner did not raise that argument in his certiorari petition (or in the court of appeals), and it is not fairly included in the question presented in the petition, which was predicated on the understanding that the "district court accepted a Rule 11(c)(1)(C) plea agreement" and that such an agreement "'binds the court'" Pet i (quoting Fed R Crim P 11(c)(1)(C)) See *Wood* v *Allen*, 130 S Ct 841, 851 (2010) (refusing to decide a question not fairly included in the question presented) In any event, the argument lacks merit because the agreement expressly invokes Rule 11(c)(1)(C), see J A 20a, 31a, which, in turn, provides that the parties' sentencing stipulation "binds the court once it accepts the plea agreement," Fed R Crim P 11(c)(1)(C) The agreement also states that, if the district court does not impose sentence in accordance with its terms, the agreement will be "void" and petitioner "will be allowed to withdraw the plea of guilty" J A 31a Those provisions show that the agreement was binding on the court once accepted

134a At sentencing, petitioner's counsel reminded the court that the parties had entered into a type C agreement for a stipulated sentence of 106 months, see J A 47a, and the court went on to impose that sentence after confirming the parties' agreement and adopting the findings and calculations in the PSR, see J A 47a-49a The judgment specifically stated that petitioner had pleaded guilty "pursuant to a Rule [11](c)(1)(C) agreement " J A 52a (emphasis omitted)

In short, at every stage of the plea and sentencing process, the parties, the district court, and Probation Office recognized that petitioner was pleading guilty pursuant to Rule 11(c)(1)(C) and that, if accepted, the plea agreement would require the imposition of a 106-month term of imprisonment The court's imposition of that sentence, in accordance with Rule 11(c)(1)(C), demonstrates that the specific sentence contained in the plea agreement provided the basis for petitioner's sentence

b In arguing to the contrary, petitioner attributes great significance to a provision in the plea agreement stating that "[petitioner] agrees to have his sentence determined pursuant to the Sentencing Guidelines " Pet Br 18 (quoting J A 28a) In petitioner's view, the "plain language" of that provision "alone" shows that his "sentence was intended to be and was in fact 'based on' the Guidelines " *Ibid* But petitioner overstates the import of that provision, because he overlooks that the parties' agreement to a 106-month term of imprisonment did not obviate the need for the court to use the Guidelines to determine other aspects of petitioner's sentence The parties did not reach a similarly specific agreement about such items as the fine or the term and conditions of supervised release See J A 25a-26a

Thus, even though the term of imprisonment was conclusively determined by the parties' agreement (and the court's acceptance of that agreement), there were still reasons, independent of the term of imprisonment, to calculate petitioner's offense level and criminal history score For instance, the offense level was necessary to determine the amount of the fine (see Guidelines § 5E1 2(c)(3)), although the court ultimately waived the fine, pursuant to Guidelines § 5E1 2(a) and (e), due to petitioner's inability to pay See J A 59a In addition, even when the criminal-history calculations are not the basis for a defendant's sentence, such calculations are still relevant to the Bureau of Prisons, which uses them as part of its process for determining what level of supervision an inmate needs [14]

The court of appeals was thus correct in concluding that the condition precedent to a Section 3582(c)(2) adjustment—that the term of imprisonment be "based on" the Guidelines range—was not satisfied in petitioner's case

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[14] The Bureau of Prisons uses an inmate's criminal history, as reflected in the judgment or PSR, when making a "custody classification" for the inmate, which indicates "how much staff supervision an inmate requires " Federal Bureau of Prisons, U S Dep't of Justice, *Program Statement P5100 08, Inmate Security Designation and Custody Classification*, Ch 6, at 1 (Sept 12, 2006), http //www bop gov/policy/progstat/5100_008 pdf, see also *id* Ch 6, at 4, 20 (providing for use of "Criminal History Score" in completing Custody Classification Form), *id* Ch 4, at 8-9 (explaining calculation of "Criminal History Score" from the judgment and statement of reasons, or the PSR)

C Using Section 3582(c)(2) To Reduce A Specific Sentence That Was Required Under Rule 11(c)(1)(C) Inappropriately Vitiates The Terms Of The Parties' Agreement

Petitioner's construction of Section 3582(c)(2) would give defendants an unjustified windfall by allowing them to retain all the benefits of their plea agreements (*e g* , dismissal of counts and other sentencing concessions made by the government) while reducing their sentences and thus depriving the government of a principal benefit of their Rule 11(c)(1)(C) bargains (the guarantee of a particular sentence or sentencing range)

1 Plea agreements are essential to the administration of criminal justice

This Court recognized long ago that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice " *Santobello* v *New York*, 404 U S 257, 260 (1971), see also Fed R Crim P 11 advisory committee's note (1974 Amendment) (noting that "[a]dministratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions," and characterizing "plea bargaining as an ineradicable fact"), Guidelines, Ch 1, Pt A, Subpt 1, intro comment (n 4(c)) ("Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement ") [15]

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[15] Of the 95,206 federal defendants whose cases resulted in judgment during Fiscal Year 2009, 87 9% were convicted upon guilty pleas See Administrative Office of the U S Courts, *2009 Annual Report of the Director Judicial Business of the United States Courts*, Tbl D-4, at 239 (2010), http://www uscourts gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion pdf

Plea bargaining "flows from the 'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v *Hayes*, 434 U S 357, 363 (1978) (quoting *Brady* v *United States*, 397 U S 742, 752 (1970)) For example, "a great many" defendants are "motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after trial to judge or jury," while the government may obtain a "more promptly imposed punishment" and preserve prosecutorial resources by not proceeding to trial *Brady*, 397 U S at 752

Consistent with the contractual nature of plea agreements, the parties to such agreements are generally held to the bargains struck through their negotiations See, *e g* , *United States* v *Hyde*, 520 U S 670, 671 (1997) (holding that a defendant was not entitled to withdraw a guilty plea before the agreement was accepted by court, absent a "fair and just reason," under language now located at Fed R Crim P 11(d)(2)(B)), *Santobello*, 404 U S at 262 (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be part of the inducement or consideration, such promises must be fulfilled"), *Brady*, 397 U S at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action "), see also, *e g* , *United States* v *Young*, 223 F 3d 905, 911 (8th Cir 2000) (concluding that the government was "entitled to the benefit of its bargain" under a plea agreement), cert denied, 531 U S 1168 (2001), *United States* v *Ringling*, 988 F 2d 504, 506 (4th Cir 1993) ("Plea bargains rest on

contractual principles, and each party should receive the benefit of its bargain ") Thus, a plea agreement remains binding even after a favorable change in the law that would have benefitted the defendant, because the "possibility" of such a change "occurring after a plea is one of the normal risks that accompanies a guilty plea " *United States* v *Sahlin*, 399 F 3d 27, 31 (1st Cir 2005), accord *United States* v *Robinson*, 587 F 3d 1122, 1129 (D C Cir 2009), *United States* v *Silva*, 413 F 3d 1283, 1284 (10th Cir 2005)

2 The government's construction of Section 3582(c)(2) preserves the parties' bargain

In addition to being inconsistent with the binding nature of a type C agreement, permitting a defendant who pleaded guilty in exchange for a specific sentence to obtain a Section 3582(c)(2) sentence reduction would result in unjustified benefits to the defendant, at the government's expense

In exchange for the certainty of obtaining a guilty plea and a specific sentence, the government often gives up the ability to seek a higher sentence, or moves to dismiss some of the charges against a defendant [16] Indeed,

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[16] See, *e g* , *United States* v *Green*, 595 F 3d 432, 433-434 (2d Cir 2010) (defendant pleaded guilty to Section 924(c) count and, on one of two drug counts, to lesser charge not carrying ten-year minimum, in exchange for the government's dismissal of second drug count and agreement on 168-month sentence), *Scurlark*, 560 F 3d at 842 (government agreed to dismiss two counts, forgo sentencing enhancements, and recommend 40% variance from agreed-upon sentencing range in exchange for guilty plea to single count), *Cieslowski*, 410 F 3d at 357 (government agreed to dismiss nine counts in exchange for 210-month sentence on single count to which defendant pleaded guilty), *United States* v *Trujeque*, 100 F 3d 869, 870 (10th Cir 1996) (government agreed to dismiss three drug counts and one firearm count in exchange for 84-month

in addressing the circumstances of the case that was consolidated with petitioner's in the court of appeals, that court recognized that the parties had "entered into a carefully constructed agreement in which the parties balanced many factors—including the charges to which [the defendant] would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which [the defendant] would be held responsible" J A 74a The parties' contractual bargain, which is binding on the court after it accepts a Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were construed to grant the court discretion to lower the agreed-upon sentence in light of a later amendment to a Guidelines range

In seeking a sentence reduction under Section 3582(c)(2), a defendant is not attempting to withdraw his guilty plea Instead, he seeks to retain all the benefits of his plea agreement *in addition to* a lower sentence than the one to which he and the government agreed But, by entering a type C plea agreement, petitioner already bargained away the possibility of a lower sentence In such circumstances, permitting the sentencing court to exercise discretion under Section 3582(c)(2) to reduce his sentence would result in an unjustified windfall to him

3 Petitioner benefitted from his plea agreement

The facts of this case reveal the potential for such unwarranted gains Petitioner plainly benefitted from his plea agreement because he obtained the certainty of a 106-month sentence, which reflected a sentence at the bottom of his anticipated Guidelines range In light of

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sentence on two less serious drug counts to which defendant pleaded guilty)

his extensive criminal history, which included convictions for, *inter alia*, second-degree attempted burglary, first-degree trafficking in a controlled substance, receiving stolen property and first-degree wanton endangerment, see J A 113a-128a, the district court, in the absence of the plea agreement, could well have imposed a higher sentence within the Guidelines range, an upward variance from petitioner's advisory range, or an upward departure on the ground that petitioner's criminal history category substantially under-represented the seriousness of his criminal history (Guidelines § 4A1 3(a)(1), p s) See p 11, *supra* (describing how petitioner's criminal-history score was capped)

Petitioner was evidently concerned that his criminal history might result in a sentence greater than 106 months Even though the plea agreement bound the court to a fixed sentence, it reserved the parties' right to challenge the district court's criminal-history calculation, and the parties struck from the agreement a provision that would have prevented petitioner from seeking a departure from his criminal-history category pursuant to Guidelines § 4A1 3 See J A 28a As the prosecutor explained at the plea hearing, the significance of the deletion was "that if there's an issue that arises with regard to [petitioner's] criminal history, [petitioner's] attorney will have an opportunity to argue to the Court that his criminal history ought to be [IV] " J A 43a By entering into a Rule 11(c)(1)(C) plea agreement to a specific sentence, however, petitioner eliminated the possibility that the government might seek, or that the district court might impose, a term of imprisonment greater than 106 months

Petitioner could have agreed to have the district court sentence him under its own view of the applicable

Guidelines imprisonment range and of what an appropriate sentence within that range would be See Fed R Crim P 11(c)(1)(B) Such a sentence would indeed have been "based on" a Guidelines range But petitioner instead agreed to circumscribe the district court's discretion and to bind the government and the court to a 106-month term of imprisonment Section 3582(c)(2) should be interpreted in a manner that holds petitioner to the terms of the bargain he struck

4 Recognizing the binding nature of a Rule 11(c)(1)(C) agreement to a specific sentence is not inconsistent with waiver principles and does not render a sentence "immutable"

a Contrary to petitioner's argument (Br 25-26 & n 6), recognizing the binding nature of the parties' sentence stipulation in a type C plea agreement does not mean that Section 3582(c)(2) is trumped by either the agreement or Rule 11(c)(1)(C) Rather, the binding nature of the sentence in a Rule 11(c)(1)(C) agreement gives content to the statutory inquiry into whether such a sentence was "based on" a retroactively lowered Guidelines range

Petitioner's extended discussion of waiver principles (Br 34-38) is therefore beside the point Petitioner contends (Br 35) that "[i]n the absence of an explicit waiver of the right to have a motion for relief under § 3582(c)(2) considered, a waiver cannot be presumed, implied, or read into the plea agreement " He also contends that the integration clause of his plea agreement (J A 32a) "explicitly precludes a waiver of § 3582(c)(2) relief from being read into or implied from it," Pet Br. 36-37, and that "[i]f the government wished [him] to waive any future consideration of a § 3582(c)(2) sentence reduction,

it had the obligation as the drafter of the plea agreement to include that provision in the document," *id* at 37 Those arguments are misplaced By its nature, a Rule 11(c)(1)(C) agreement in which the defendant pleads guilty in exchange for a specific sentence precludes a future reduction under Section 3582(c)(2) Because such a sentence is not "based on" the subsequently lowered Guidelines ranges, no right of eligibility for relief under Section 3582(c)(2) attaches in the first place, there simply is no right to "waive " Therefore, it was not necessary for the government to bargain for such a provision in the plea agreement in this case

b Similarly erroneous is petitioner's contention (Br 39-42) that recognizing the binding nature of the agreement here would render a Rule 11(c)(1)(C) defendant ineligible for other forms of sentence reductions pursuant to Federal Rule of Criminal Procedure 35(b) or Section 3582(c)(1)(A) Unlike Section 3582(c)(2), those provisions do not condition eligibility for relief on a requirement that the sentence be "based on" a Guidelines range that was—in the words of the binding policy statement in Guidelines § 1B1 10(b)(1)—"applied when the defendant was sentenced " Nor is relief under Rule 35(b) or Section 3582(c)(1)(A) inconsistent with the contractual bargain struck by the parties to a Rule 11(c)(1)(C) agreement In both of those scenarios, a sentence reduction must be instigated by the government (*i e* , the party that stands to cede some of the benefits of its bargain) See note 6, *supra*

Moreover, the grounds for reductions under Rule 35(b) and Section 3582(c)(1)(A) are exceptional developments with respect to the defendant himself that occurred after the original plea (*e g* , the defendant's rendering of substantial assistance to law enforcement or

his reaching 70 years of age after having served 30 years of imprisonment) By contrast, none of the factors particular to petitioner had changed when he sought relief under Section 3582(c)(2), the only change was a relatively small decrease in the Guidelines range (from 106-117 months to 97-106 months) But a defendant who enters into a type C agreement assumes the risk of a future, ameliorative change in the penalties applicable to his offense by binding the district court to a specific sentence in exchange for his guilty plea

c Finally, contrary to petitioner's contention (Br 39), the government's construction of Section 3582(c)(2) is not inconsistent with the Sentencing Commission's determination, when it retroactively lowers a Guidelines range, "that the original guideline was too harsh " The sentencing benefits that a Rule 11(c)(1)(C) defendant receives pursuant to his or her plea agreement will often approximate, and could well exceed, any sentence reduction a defendant may receive within the "narrow bounds established by the Commission" pursuant to Section 3582(c)(2) *Dillon*, 130 S Ct at 2694

For example, even if petitioner were found to be eligible for Section 3582(c)(2) relief, he could have received a reduction of no more than nine months of his 106-month term of imprisonment J A 75a But, as discussed above, by pleading guilty at the outset in exchange for the 106-month term, petitioner avoided the possibility that his extensive criminal history would lead the government to request, and the district court to impose, a sentence at or above the top of the earlier Guidelines range (117 months) While the record does not disclose what sentence the district court would have imposed if it had not been bound by the stipulated 106-month sentence, petitioner potentially took at least 11

months off of his original sentence by pleading guilty under a Rule 11(c)(1)(C) agreement prescribing a specific sentence

Furthermore, in many cases, a Rule 11(c)(1)(C) defendant will have had some charges dismissed as part of his plea agreement, perhaps including even a count carrying a mandatory minimum sentence See note 16, *supra* (citing illustrative cases) The benefits that such a defendant received as part of his original bargain could easily exceed any sentence reduction that he could have later received under Section 3582(c)(2) had he not entered into a binding agreement about a specific sentence Therefore, construing Section 3582(c)(2) to preclude sentence reductions for a defendant who pleaded guilty in exchange for a specific sentence or sentencing range appropriately preserves the terms of the parties' bargain and works no injustice

CONCLUSION

The judgment of the court of appeals should be affirmed

Respectfully submitted

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JANUARY 2011

APPENDIX

1 18 U S C 3582 provides in pertinent part

Imposition of a sentence of imprisonment

* * * * *

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT —The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction, or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g),

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission, and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure, and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U S C 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

2 18 U S C 3742 provides in pertinent part

Review of a sentence

(a) APPEAL BY A DEFENDANT —A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law,

(2) was imposed as a result of an incorrect application of the sentencing guidelines, or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprison-

ment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range, or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable

(b) APPEAL BY THE GOVERNMENT —The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law,

(2) was imposed as a result of an incorrect application of the sentencing guidelines,

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range, or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General

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[1] See References in Text note below

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement, and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement

* * * * *

3 Federal Rule of Criminal Procedure 11 provides in pertinent part

Pleas

* * * * *

(c) Plea Agreement Procedure

(1) In General An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement The court must not participate in these discussions If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will

(A) not bring, or will move to dismiss, other charges,

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court), or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)

(2) **Disclosing a Plea Agreement** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera

(3) **Judicial Consideration of a Plea Agreement.**

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request

(4) **Accepting a Plea Agreement.** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment

(5) **Rejecting a Plea Agreement** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera)

(A) inform the parties that the court rejects the plea agreement,

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea, and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere

(1) before the court accepts the plea, for any reason or no reason, or

(2) after the court accepts the plea, but before it imposes sentence if

(A) the court rejects a plea agreement under Rule 11(c)(5), or

(B) the defendant can show a fair and just reason for requesting the withdrawal

* * * * *

4 Sentencing Guidelines § 1B1 10 provides

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority —

(1) In General —In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U S C § 3582(c)(2) As required by 18 U S C § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement

(2) Exclusions —A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U S C § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant, or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range

(3) Limitation —Consistent with subsection (b), proceedings under 18 U S C § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant

(b) Determination of Reduction in Term of Imprisonment —

(1) In General —In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U S C § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected

(2) Limitations and Prohibition on Extent of Reduction —

(A) In General —Except as provided in subdivision (B), the court shall not re-

duce the defendant's term of imprisonment under 18 U S C § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection

(B) Exception —If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U S C § 3553(a) and United States v Booker, 543 U S 220 (2005), a further reduction generally would not be appropriate

(C) Prohibition —In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served

(c) Covered Amendments —Amendments covered by this policy statement are listed in Appendix C as follows 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715

Commentary

Application Notes

1 Application of Subsection (a) —

(A) Eligibility —Eligibility for consideration under 18 U S C § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U S C § 3582(c)(2) and is not consistent with this policy statement if (i) None of the amendments listed in subsection (c) is applicable to the defendant, or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e g , a statutory mandatory minimum term of imprisonment)

(B) Factors for Consideration —

(i) In General —Consistent with 18 U S C § 3582(c)(2), the court shall consider the factors set forth in 18 U S C § 3553(a) in determining (I) whether a reduction in the defendant's term of imprisonment is warranted, and (II) the extent of such reduction, but only within the limits described in subsection (b)

(ii) Public Safety Consideration —The court shall consider the nature and seriousness of the danger to any person or the commu-

nity that may be posed by a reduction in the defendant's term of imprisonment in determining (I) Whether such a reduction is warranted, and (II) the extent of such reduction, but only within the limits described in subsection (b)

(iii) Post-Sentencing Conduct —The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining (I) Whether a reduction in the defendant's term of imprisonment is warranted, and (II) the extent of such reduction, but only within the limits described in subsection (b)

2 *Application of Subsection (b)(1) —In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced All other guideline application decisions remain unaffected*

3 *Application of Subsection (b)(2) —Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U S C § 3582(c)(2) and this policy statement Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's*

term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1) For example, in a case in which (A) The guideline range applicable to the defendant at the time of sentencing was 41 to 51 months, (B) the original term of imprisonment imposed was 41 months, and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate For example, in a case in which (A) The guideline range applicable to the defendant at the time of sentencing was 70 to 87 months, (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate

In no case, however, shall the term of imprisonment be reduced below time served Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section

4 *Supervised Release* —

(A) Exclusion Relating to Revocation —Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release

(B) Modification Relating to Early Termination — If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U S C § 3583(e)(1) However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised

release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1)

Background *Section 3582(c)(2) of Title 18, United States Code, provides "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U S C § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission "*

This policy statement provides guidance and limitations for a court when considering a motion under 18 U S C § 3582(c)(2) and implements 28 U S C § 994(u), which provides "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced "

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1)

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months This criterion is in accord with the legislative history of 28 U S C § 994(u) (formerly § 994(t)), which states "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines The Committee does not believe the courts should be burdened with adjustments in these cases " S Rep 225, 98th Cong , 1st Sess 180 (1983)*

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* So in original Probably should be "to fall above the amended guidelines"

5 Sentencing Guidelines § 6B1.2 provides in pertinent part:

Standards for Acceptance of Plea Agreements (Policy Statement)

* * * * *

(c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range, or

(2) (A) the agreed sentence departs from the applicable guideline range for justifiable reasons, and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order

REPLY BRIEF

8

No. 09-10245

Supreme Court, U.S.
FILED
FEB 14 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM FREEMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

William Freeman was sentenced to a term of imprisonment within a guideline range that the Sentencing Commission subsequently lowered and made retroactive. Title 18 U.S.C. §3582(c)(2) authorizes district courts to reduce a previously imposed term of imprisonment that was "based on" a retroactively lowered sentencing range. Section 3582(c)(2) is "intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010).

The government claims that all defendants who enter into plea agreements recommending a specific sentence or range under Rule 11(c)(1)(C) are categorically ineligible to be considered for a sentence reduction under §3582(c)(2), even when, as here, the plea agreement expressly states the parties' intent that the defendant be sentenced within the correctly calculated guideline range, the court defers acceptance of the agreement until the probation officer confirms that the parties' calculation of the guideline range is correct, and the court expressly adopts the probation officer's application of the guidelines and sentences the defendant within the guideline range.

The government reaches this counterintuitive conclusion by arguing that (1) "based on" means "that which is legally binding," (2) Rule 11(c)(1)(C) legally binds the court to impose sentence in compliance with the agreement once accepted, (3) therefore, a sentence recommended in a C plea agreement is necessarily "based on" the agreement and not the guideline range and may never be reduced under §3582 regardless of what actually occurred.

The government's proposed definition of "based on" is inconsistent with the ordinary meaning of the phrase, does not appear in the statute, and is contrary to clear evidence that Congress chose not to adopt it. Its argument that Rule 11(c)(1)(C) "legally binds" the court never to reduce a sentence once it has been imposed lacks any basis in the rule itself, and is contrary to §3582 as a whole and the Rules Enabling Act. The case-by-case approach adopted by a number of lower courts allows the statute to function without unnecessarily precluding relief for defendants like Mr. Freeman whose sentences were clearly "based on" the guideline range. The government is wrong that determining eligibility for relief under this approach results in unjustified windfalls. Once a court finds a defendant to be eligible for a sentence reduction, it next decides whether to reduce the sentence at all, and if so, by how much. There is no justification for creating limits on eligibility in the name of possible windfalls that courts have the power to avoid if they exist.

I. THE GOVERNMENT'S PROPOSED DEFINITION OF "BASED ON" AS "THAT WHICH IS LEGALLY BINDING" IS CONTRARY TO THE TEXT, FUNCTION AND PURPOSE OF SECTION 3582(c)(2).

The government begins, not with the text of §3582(c)(2), but by invoking finality. U.S.Br. 20-21. But "Section 3582(c)(2) establishes an exception to the general rule of finality." *Dillon*, 130 S. Ct. at 2690. "Notwithstanding the fact that a sentence to imprisonment can subsequently be . . . modified pursuant to the provisions of subsection (c) . . . a judgment of conviction that includes such a sentence constitutes a final judgment for all *other* purposes." 18

U.S.C. §3582(b) (emphasis supplied). The text of §3582(c)(2) provides no more assistance to the government than finality does.

A. The Government's Proposed Definition of "Based On" Fails Under the Plain Language of §3582(c)(2).

The government contends that "based on" means "the element that was of binding legal consequence," or "that which is legally binding," U.S.Br. 26, 27; that Rule 11(c)(1)(C) binds the court to impose an agreed sentence once it accepts the agreement; and thus, such a sentence is never "based on" a subsequently lowered guideline range even when it was within the correctly calculated guideline range. *Id.* at 22, 29, 32.

Mr. Freeman's term of imprisonment was "based on" the retroactively lowered crack cocaine guideline under the ordinary dictionary definitions offered in his opening brief, *see* Pet.Br. 16 (*e.g.*, "serve as a base for," "form a foundation for," "point from which (something) can develop"), any definition offered by the government, *see* U.S.Br. 24 (*e.g.*, "use as a . . . basis for," "a fundamental principle or underlying concept"), and other common definitions. *See* Oxford English Dictionary ("supporting part," "structure . . . underlying some system of activity or operations; the resources, etc., on which something draws or depends for its operation"), http://www.oed.com/; Merriam-Webster Dictionary ("bottom of something considered as its foundation," "principal component of something," "something on which something else is established or based," "an underlying condition or state of affairs"), www.merriam-webster.com.

The government, however, claims that "based on" means "the element that was of binding legal consequence in [the sentence's] imposition." U.S.Br. 27. But those words do not fit any common definition of the phrase, nor do they appear in §3582(c)(2). This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). The Court should not do so here.

If an element of a sentence must be "of binding legal consequence in its imposition" in order for the sentence to be "based on" it, then the guideline range itself would have to be legally binding in order for the sentence to be "based on" it. Under the government's definition, no defendant, with or without a C plea agreement, would ever be eligible for relief. The Guidelines are not legally binding, *United States v. Booker*, 543 U.S. 220 (2005), and may not be treated as such even when the court ultimately imposes a sentence within the guideline range. *Rita v. United States*, 551 U.S. 338, 351 (2007). Yet relief is available under §3582(c)(2) whether the term of imprisonment was within or outside the non-binding guideline range.[1]

Moreover, reading the government's definition into the statute would create an exclusion that Congress chose not to create. When Congress enacted §3582(c)(2) and §3742 in the Sentencing Reform Act of 1984, it provided two ways

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[1] *See* USSG §1B1.10(b)(2)(B), p.s. ("a reduction comparably less than the amended guideline range . . . may be appropriate"); *id.*, comment. (n.3) (same); *Dillon*, 130 S. Ct. at 2691-92 (same); *United States v. Franklin*, 600 F.3d 893, 896 (7th Cir. 2010) (below-guideline sentence specified in a C plea agreement may be "based on" the guideline range if the agreement "evidence[s] an intent to tie the sentence to the guidelines").

in which an otherwise final sentence may be modified. *See* 18 U.S.C. §3582(b)(1), (3). It allowed a defendant to appeal a sentence "specified in a plea agreement" under Rule 11(e)(1)(C) on the same grounds as any other sentence, except upon the ground that the sentence was greater than the applicable guideline range unless it was also greater than the sentence specified in the agreement,[2] and this remains the law today. *See* 18 U.S.C. §3742(a), (c) (2010). But Congress has not excluded from § 3582(c)(2) any type of sentence included in a C plea agreement.

Contrary to the government's contention that Congress's failure to write §3582(c)(2) "to cover defendants who agree to specific sentences under Rule 11(c)(1)(C)" somehow helps its cause, U.S.Br. 30-31, the differential treatment of appeals and reductions of sentences specified in C plea agreements is clear evidence that Congress intentionally chose not to exclude such sentences from §3582(c)(2). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994). Section 3742 "shows that Congress knew how to draft a [limitation in §3582(c)(2) if] it wanted to," *Chicago*, 511 U.S. at 338, and this Court refrains from "reading a phrase into the statute when Congress has left it out." *Keene Corp.*, 508 U.S. at 208.

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[2] *See* 18 U.S.C. §3742(a)(1)-(4) (1987), added by Pub. L. No. 98-473, §213 (Oct. 12, 1984). The structure was changed in 1988, but the limitation remained the same. *See* Pub. L. No. 100-690, §7103(a)(8) (Nov. 18, 1988).

The government also suggests that a defendant cannot appeal a sentence imposed pursuant to a C plea agreement on the ground that it was "imposed as a result of an incorrect application of the sentencing guidelines" under §3742(a)(2). U.S.Br. 31 n.10. While acknowledging that §3742 says no such thing, the government asserts that "such a limitation was unnecessary because the sentence in such a case is the result of the parties' agreement, which binds the district court, and not of any 'application' of the Guidelines." *Id.* Aside from the circularity of this argument, which depends entirely on the government's theory that a C plea agreement necessarily means that the guidelines were not applied, it is incorrect. Under the plain terms of §3742(a) and (c), a defendant may appeal a sentence imposed pursuant to a C plea agreement on the ground that the sentence was "imposed as a result of an incorrect application of the sentencing guidelines."[3] Thus, §3742 recognizes that the guidelines may be applied in cases involving C plea agreements, as they were here.

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[3] *See, e.g., United States v. Smith*, 918 F.2d 664, 669 (6th Cir. 1990) (§3742(c)(1) does not bar a defendant from "appeal[ing] his sentence under 18 U.S.C. §3742(a)(1) or (a)(2), which permit appeals of sentences 'imposed in violation of law' and 'imposed as a result of an incorrect application of the sentencing guidelines[.]'"); *United States v. Carrozza*, 4 F.3d 70, 86 n.12 (1st Cir. 1993) ("defendant may . . . appeal a sentence pursuant to a Rule 11(e)(1)(C) plea agreement on the grounds that the sentence was imposed in violation of law or as a result of an incorrect application of the guidelines"); *United States v. Silva*, 413 F.3d 1283, 1284 (10th Cir. 2005) (defendant who "agrees to and receives a specific sentence" may appeal "if it was (1) imposed in violation of law, (2) imposed as a result of an incorrect application of the guidelines, or (3) is greater than the sentence set forth in the plea agreement.").

B. This Court's Interpretation of "Based Upon" in a Different Statute Fails to Support the Government's Proposed Definition and Instead Supports the Ordinary Meaning of "Based On" in §3582(c)(2).

Rather than relying on the language and context of §3582(c)(2), the government seeks support from decisions interpreting "based on" or "based upon" in other statutes. U.S.Br. 24-27 & n.9.

The government relies primarily on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). U.S.Br. 24-26. The statute at issue there provided an exception to immunity of a foreign state from suit in the courts of the United States "in any case 'in which the action is based upon a commercial activity carried on in the United States by the foreign state.'" *Id.* at 356 (quoting 28 U.S.C. §1605(a)(2)). In interpreting the phrase "based upon," the Court relied on (1) the common dictionary definition, (2) the surrounding statutory language, (3) the particular facts made relevant by the statute's requirements, and (4) the purpose of the statute. *Id.* at 357-58, 363.

The Court first determined that the phrase "based upon," as defined in the dictionary and as used in 28 U.S.C. §1605(a)(2), meant "conduct that forms the 'basis,' or 'foundation,' for a claim," and "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. The Court then examined the complaint to identify the conduct upon which the suit was based. The plaintiff alleged personal injury resulting from unlawful detention and torture by the Saudi Government, after having been recruited and hired in the United States. *Id.*

at 351. Since the plaintiff did not allege breach of contract in recruitment and hiring, but personal injuries caused by intentional and negligent wrongs, "[t]hose torts, and not the arguably commercial activities that preceded their commission, form[ed] the basis for the . . . suit." *Id.* at 358. The commercial acts that "led to the conduct that eventually injured the [plaintiffs] . . . are not the basis for [the] suit." *Id.* at 358.

Nelson supports Mr. Freeman's position. The Court used the dictionary definition and surrounding statutory language to determine the meaning of "based upon." The Court examined the allegations in the complaint to "identify[] the particular conduct on which [the] action [was] 'based' for purposes of the Act." *Id.* at 351, 356. *Nelson* thus demonstrates the commonsense proposition that to determine what a thing is "based on," the relevant facts must be examined. Similarly, under §3582(c)(2), courts must examine the plea agreement and sentencing record to determine whether the term of imprisonment was "based on" a subsequently lowered guideline range.

The government claims to derive its definition from *Nelson*'s reading of "based upon" to mean "elements of a claim that . . . would entitle a plaintiff to relief," and its statements that the commercial conduct that "led to" the tortious conduct was not enough to be the basis of the suit, nor was a "connection" between them. U.S.Br. 25, 27. But these passages have no relevance beyond the statute at issue there. That statute required claims based upon acts that were commercial in nature, committed in the United States, and actionable, and it specifically distinguished between "a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such

activity." *Id.* at 357-58 & n.4. In contrast, §3582(c)(2) contains no requirements or distinctions but only that the term of imprisonment was "based on" a subsequently lowered guideline range.

Further, the "manifest purpose" of the statute in *Nelson* was to "codify the restrictive theory of foreign sovereign immunity." *Id.* at 363. The purpose of §3582(c)(2) is not "restrictive," but rather is "intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon*, 130 S. Ct. at 2692. Congress intended that the "value" of §3582(c)(2) would be "the availability of *specific review* and reduction of a term of imprisonment . . . to respond to changes in the guidelines," S. Rep. No. 98-225, at 56 (1983) (emphasis supplied), where, as here, the Commission makes an amendment retroactive "because of a change in the community view of the offense." *Id.* at 180.[4] Under the government's definition, "specific review" is categorically prohibited for any specific sentence or range recommended in a C plea agreement. There is no support for the government's rule.

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[4] The community view of crack offenses has dramatically changed, as evidenced by the two-level reduction at issue here, and by Congress's recent enactment of the Fair Sentencing Act of 2010, in which it changed the powder-to-crack quantity ratio from 100:1 to approximately 18:1, and directed the Commission to promulgate temporary, emergency amendments reflecting that ratio. *See* Pub. L. No. 111-220, 124 Stat. 2372. The Commission promulgated emergency amendments effective November 1, 2010, and is considering permanent amendments and whether the amendments should be made retroactive. *See* 76 Fed. Reg. 3193-02, 3194-95 (Jan. 19, 2010).

C. The Exceptions to the Government's Rule Demonstrate That It Lacks Any Principled Basis.

The government claims that, by virtue of its definition of "based on" as "legally binding" and the binding nature of a C plea agreement under Rule 11(c)(1)(C), no recommendation in a C plea agreement can ever be "based on" a guideline range. But the rule has exceptions. Noting that Rule 11(c)(1)(C) provides for agreement to a "specific sentence or sentencing range," or that "a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply," Fed. R. Crim. P. 11(c)(1)(C), the government asserts that "[a]n agreement that a Guidelines provision *does* apply, without any accompanying agreement to a specific sentence, would not preclude the resulting sentence from being 'based (in part) on' that Guidelines provision." U.S.Br. 35 (emphasis original).[5]

Under the government's proposed reading, when the parties agree, as they did here, that a defendant's offense level and criminal history would be determined at a certain level and category under specified guideline provisions, *see* J.A. 27a-28a, producing a certain guideline range, the resulting term of imprisonment would be "based on" the guideline range, and relief under §3582(c)(2) would be available. But if the parties go on, as they did here, to agree to a sentence within the agreed range, the term of imprisonment would not be "based on" the guideline range, and relief would be absolutely precluded.

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[5] The other exception is irrelevant because it does not involve a "term of imprisonment." U.S.Br. 35 & n.11.

The government's argument demonstrates that its rule must fail. There is no principled reason, let alone any textual grounding, for the proposition that a sentence under one of these agreements may be "based on" a subsequently lowered guideline range, but the other must not. In both cases, the guidelines form a basis for the sentence. If any of the specified guidelines is subsequently lowered, and the decrease is made retroactive, discretionary relief under §3582(c)(2) is available.

II. RULE 11(c)(1)(C) DOES NOT TRUMP SECTION 3582(c)(2).

The government's argument also fails because it depends upon the contention that Rule 11 (c)(1)(C) "legally binds" the court never to reduce a sentence once it has been imposed. U.S.Br. 22, 26, 28-32. This contention not only lacks any basis in Rule 11(c)(1)(C), but is also contrary to §3582 as a whole and the Rules Enabling Act.

An agreed sentence, range, or guideline provision in a C plea agreement "binds the court once the court accepts the plea agreement," Fed. R. Crim. P. 11(c)(1)(C), and "the agreed disposition [is then] included in the judgment." Fed. R. Crim. P. 11(c)(4). But a "sentence to imprisonment can *subsequently* be" modified or corrected in specified ways, though "such a sentence constitutes a final judgment *for all other purposes*." *Id.*, §3582(b) (emphasis supplied). Section 3582(c)(2) "giv[es] courts the power to 'reduce' an otherwise final sentence." *Dillon*, 130 S. Ct. at 2690. The "court may ... modify a term of imprisonment once it has been imposed" by "reduc[ing] the term of imprisonment ... in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range

that has subsequently been lowered by the Sentencing Commission." *Id.*, §3582(c) (emphasis supplied).

Rule 11(c)(1)(C) does not purport to limit the court's statutory authority to later "reduce" an otherwise final sentence under §3582(c)(2) "once it has been imposed," nor could it. A rule of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). A rule of procedure may "govern[] only 'the manner and the means' by which the litigants' rights are 'enforced,'" but may not "alter[] 'the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (internal citations omitted). Under the government's theory, Rule 11(c)(1)(C) would alter the rules of decision by which courts adjudicate defendants' rights under §3582(c)(2) by giving "content to the statutory inquiry" into what a sentence was "based on." U.S.Br. 45. That "content," according to the government, is that a specific sentence in a C plea agreement is necessarily based solely on the agreement and thus may not be reduced under §3582(c)(2). U.S.Br. 28-30, 32-33. If the government is correct, the rule is invalid.

Nor does the Commission's policy statement endorse the government's theory. The government claims that the phrase, "guideline provisions that were applied when the defendant was sentenced," lifted from USSG §1B1.10(b)(1), p.s., means that the "Commission has plainly stated that the sentence-modification power extends only to the parts of the Guidelines that 'were applied when the defendant was sentenced.'" U.S.Br. 32. The government claims that it would be "inconsistent with" this phrase to permit examination of the actual facts because: "The court

does not 'appl[y]' the Guidelines at that point but instead imposes the specific sentence to which the parties had agreed," which "by the express terms of Rule 11(c)(1)C), 'binds the court' after it accepts the guilty plea." U.S.Br. 32-33.

The phrase in no way supports the government's insistence that the guidelines are never applied when a C plea agreement recommends a specific sentence. The point of the subsection in which the phrase appears is that "guideline application decisions" other than the substitution of the amended range for the initial range are to be left "unaffected," and nothing more.[6] *Dillon*, 130 S. Ct. at 2694.

III. THE CASE-BY-CASE APPROACH ALLOWS THE STATUTE TO FUNCTION.

Under the case-by-case approach, the district court determines from the terms of the plea agreement and the sentencing record whether the term of imprisonment was "based on" a subsequently lowered guideline range. District court judges who impose sentences are "certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not." J.A. 88a (White, J. concurring).

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[6] "[T]he court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." USSG §1B1.10(b)(1), p.s.

The government claims that only one circuit has adopted the case-by-case approach, U.S.Br. 22, while citing in a footnote several cases applying that approach. *Id.* at 22-23 n.8. Four circuits apply the case-by-case approach,[7] two circuits have said that it may apply,[8] and three circuits foreclose any examination of the facts.[9]

Examining the plea agreement and the sentencing record is the only way to reliably determine whether a term of imprisonment was in fact "based on" a subsequently lowered guideline range, without unnecessarily prohibiting relief for defendants like Mr. Freeman. A rigid insistence that a sentence included in a C plea agreement is never "based on" a guideline range is contrary to the broad

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[7] *See United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) ("the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission"), *cert. denied*, 130 S. Ct. 1160 (2010); *United States v. Cobb*, 584 F.3d 979, 983-84 (10th Cir. 2009) (plea agreement, change of plea hearing, and sentencing hearing reflected that sentence "was tied to the guidelines at every step"); *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010) (not "all Rule 11(c)(1)(C) plea agreements foreclose relief under section 3582(c)(2)," but record must "reflect an intent to tie the sentence to the guidelines"); *United States v. Williams*, 609 F.3d 368, 372-73 (5th Cir. 2010) (declining to "adopt a categorical rule" and instead reviewing "the plea agreement, sentencing record, and applicable guidelines").

[8] *See United States v. Main*, 579 F.3d 200, 204 (2d Cir.), *cert. denied*, 130 S. Ct. 1106 (2009); *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010).

[9] *See United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004); *United States v. Scurlark*, 560 F.3d 839, 841-43 (8th Cir.), *cert. denied*, 130 S. Ct. 738 (2009); *United States v. Sanchez*, 562 F.3d 275, 282 & n.8 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1053 (2010).

remedial purpose of §3582(c)(2). *See Dillon*, 130 S. Ct. at 2692; S. Rep. No. 98-225, at 56, 180 (1983).

The government offers nothing to refute the soundness of the case-by-case approach other than to assert, incorrectly, that it requires only that the guidelines played some role in the parties' negotiations and would mean that all sentences are "based on" the guidelines. U.S.Br. 33, 36 n.12. As several courts of appeals have held, an agreed upon sentence is not "based on" a guideline range when the plea agreement and the sentencing record do not evidence an intent to tie the sentence to the guideline range.[10] No court of appeals has found that a sentence outside the guideline range was "based on" the range. *But see* USSG §1B1.10(b)(2)(B), p.s.; *id.*, comment. (n.3); *Franklin*, 600 F.3d at 897.

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[10] *See, e.g, Bride*, 581 F.3d at 891 (sentence eleven years shorter than low end of guideline range was not "based on" guideline range where parties did not "agree that the recommended sentence was in any way dependent upon or connected to the applicable Guidelines sentencing range"); *Franklin*, 600 F.3d at 896-97 (plea agreement "does not reflect an intent to tie the sentence to the guidelines," because it "did not state that the 157-month term was based upon the guidelines, and it did not explain how the parties chose the 157-month term," nor was the court's sentence tied to the correctly calculated range); *Williams*, 609 F.3d at 373 ("plea agreement never stated that the stipulated sentence depended on, or was even connected to, the applicable guideline range," and a "review of the sentencing transcript does not suggest that the district court based its decision on a guideline calculation"); *United States v. Trujeque*, 100 F.3d 869, 870 & n.2, 871 (10th Cir. 1996) (the "facts establish that Mr. Trujeque's sentence was not 'based on a sentencing range that has subsequently been lowered,'" where stipulated sentence was below the guideline range without explanation of how it was reached).

When, as here, the plea agreement expressly states the parties' intent that the term of imprisonment will not only be "tied to the guidelines," but within the correctly calculated guideline range, and the sentencing judge independently determines that it is within the correctly calculated guideline range and imposes that sentence, the term of imprisonment was "based on" the guideline range. *See Cobb*, 584 F.3d at 983.

IV. MR. FREEMAN'S TERM OF IMPRISONMENT WAS "BASED ON" A SUBSEQUENTLY LOWERED GUIDELINE RANGE.

At the change of plea hearing, the court advised Mr. Freeman that the guidelines were "advisory," but that "in order to follow them, the Court directs that the probation officer do a probation report," J.A. 39a-40a, and that the sentence would not be known "until the presentence report is completed." J.A. 40a. The prosecutor stated that "Mr. Freeman is agreeing to have his sentence determined to the Federal Sentencing Guidelines," that "we have set out our best judgment and belief how they apply in this case, and that's in numbered paragraph 11 of the plea agreement," J.A. 43a-44a, and "have agreed upon a recommended sentence that we will jointly provide to the Court," which it may accept or reject "[a]t the time of sentencing." J.A. 41a-42a. At the change of plea hearing, the court "accepted the defendant's plea of guilty," J.A. 34a-35a, but deferred acceptance of the agreement until sentencing. *See* Fed. R. Crim. P. 11(c)(3)(A).

At sentencing, defense counsel stated that the agreed sentence was within the advisory guideline range calculated by the probation officer, and requested that

the court accept the agreement. The court did so, stating that "[t]he Court will adopt the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein," J.A. 47a, and that "the sentence imposed . . . fall[s] within the guideline range[ ] and [is] sufficient to meet the objectives of the law." J.A. 49a. The court "adopt[ed] the presentence report and guideline applications without change." J.A. 95a.

The government's only response to the facts is that Mr. Freeman "overstates" the importance of ¶12 of the plea agreement (which provides, "Defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines," J.A. 28a), because there was still a "need for the court to use the Guidelines to determine" aspects of the sentence other than the term of imprisonment, and "there were still reasons, independent of the term of imprisonment, to calculate petitioner's offense level and criminal history score." U.S.Br. 38-39.

The government's suggestion that the parties agreed that Mr. Freeman's sentence would be determined by the Guidelines for some purpose other than setting the "term of imprisonment," or that the court did not use the Guidelines for that purpose, lacks any support. Paragraph 10 states that the government "agree[s] that a sentence of 106 months' incarceration is the appropriate disposition of this case." J.A. 26a. Paragraph 11 shows the parties' calculation of the offense level and criminal history category to reach that disposition, and states that "the defendant understands that the Court will independently calculate the Guidelines at sentencing." J.A. 27a-28a. Paragraph 12 states that the defendant "agrees to have his sentence determined pursuant to the Sentencing

Guidelines." J.A. 27a-28a. The court used the guidelines at sentencing to impose a term of imprisonment. J.A. 47a-51a.

V. THERE IS NO "UNJUSTIFIED WINDFALL" IN PERMITTING JUDGES TO DETERMINE WHETHER A DEFENDANT IS ELIGIBLE FOR RELIEF UNDER §3582(c)(2).

The government argues that permitting judges to determine whether a defendant's term of imprisonment was in fact "based on" a subsequently lowered guideline range would give defendants an "unjustified windfall." U.S.Br. 40. But this misapprehends the statute. When a judge finds that a defendant is eligible for relief under the first clause of §3582(c)(2), this does not result in an automatic reduction, a windfall, or a reduction that is in any way unfair to the government. Under the case-by-case approach, the court determines eligibility by reviewing the record to determine whether the term of imprisonment was "based on" a subsequently lowered guideline range. If it was, the court considers whether to reduce the sentence at all, and if so by how much (within the amended range), guided by the factors set forth in §3553(a).

If the government believes that a defendant would receive an unjustified windfall because of circumstances such as dismissal of charges or lesser charges, U.S.Br. 40, 42-43 & n.16, 47-48, it is free to persuade the court that such circumstances show that a reduction is unwarranted. The court can decline to reduce the sentence at all, or reduce it less than the full amount. There is no justification for creating limits on eligibility in the name of possible

windfalls that the court has the power to avoid if they exist.

The government fails to identify any windfall to Mr. Freeman, much less one that should totally disqualify him from eligibility for relief. It states that he "obtained the certainty of a 106-month sentence, which reflected a sentence at the bottom of his anticipated Guidelines range and avoided the possibility that his record would result in a higher Guidelines sentence, an upward variance, or an upward departure based on under-representation of his criminal history." U.S.Br. 43-44. There is no evidence that the parties or the court thought that Mr. Freeman might receive an upward departure or variance. To the extent the criminal history category might have been greater than the parties believed, J.A. 43a, they calculated it correctly. J.A. 128a. The government received the benefit of its bargain: Mr. Freeman received the agreed sentence at the bottom of the applicable Guideline range, while waiving his rights to trial, appeal, and collateral attack; the government did not bargain for a waiver of §3582(c)(2) relief. The district court appears not to have thought that a reduction in sentence would constitute a "windfall," but rather "felt constrained to deny Freeman's motion" by *Peveler*. J.A. 69a, 75a.

The government also contends that defendants assume the risk of a favorable change in law when they enter into a plea agreement. U.S.Br. 42. This contention provides no basis for holding that a defendant who entered a C plea is ineligible for relief under §3582(c)(2). The statute's very purpose is to provide a defendant with the opportunity to benefit from a favorable change in the applicable guideline range after he has been sentenced. Unless there has

been an express affirmative waiver of §3582(c)(2) relief, a defendant who pleads guilty is not foreclosed from being considered for such relief.[11]

None of the cases the government cites support its argument, and one disproves it. *United States v. Sahlin*, 399 F.3d 27 (1st Cir. 2005), and *United States v. Silva*, 413 F.3d 1283 (10th Cir. 2005), each involved a challenge on direct appeal to the validity of a sentence imposed pursuant to a guilty plea entered before *Booker* and premised on an incorrect understanding that the guidelines were mandatory. While both courts referred to the "normal risk" of a favorable change in the law such as *Booker* in rejecting the arguments, *see Sahlin*, 399 F.3d at 29; *Silva*, 413 F.3d at 1284, this principle related only to the question whether *Booker* undermined the legality of the sentence or guilty plea. Neither case involved the denial of relief under §3582(c)(2) or addressed whether the defendant might be eligible for such relief.

United States v. Robinson, 587 F.3d 1122 (D.C. Cir. 2009), demonstrates that the "assumption of risk" principle does not answer the question whether defendants sentenced pursuant to C plea agreements are eligible to seek relief under § 3582(c)(2), and supports Mr. Freeman here. The defendant sought to withdraw his guilty plea before sentencing because, he argued, the Commission had

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[11] *See, e.g., United States v. Isaacs*, 301 Fed. Appx. 183, 187 (3d Cir. 2008); *United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009); *United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009); *United States v. Goodwin*, 393 Fed. Appx. 417, 419 (8th Cir. 2010); *United States v. Leniear*, 574 F.3d 668, 672 & n.3 (9th Cir.2009); *United States v. Chavez-Salais*, 337 F.3d 1170, 1172-73 (10th Cir. 2003).

reduced the guidelines for crack offenses. Applying the risk principle to uphold the guilty plea as valid, the court ruled that a guilty plea is not "automatically tainted" by a favorable change in the guideline range. *Id.* at 1129. The court distinguished this case from those in which courts granted reductions under §3582(c)(2) in cases involving C pleas, because in this case, the defendant "moved to withdraw his guilty plea, not reduce his sentence." *Id.* at 1129 n.9. In fact, the defendant moved separately for a reduction under §3582(c)(2), which the district court considered but denied because the applicable guideline range was not based on crack, but on another drug. *See* Order, *United States v. Dodd*, Crim. No. 04-128-06 (D.D.C. Mar. 20, 2009).

As *Robinson* shows, district courts are fully capable of determining, on a case-by-case basis, whether sentences imposed under C plea agreements are "based on" a guideline range that was subsequently lowered. There is no reason to contort the text of 3582(c)(2) to categorically prohibit such determinations.

CONCLUSION

For the above-stated reasons and those given in Mr. Freeman's opening brief, the judgment of the court of appeals should be reversed and the case remanded to the district court for consideration of Mr. Freeman's motion under §3582(c)(2).

Respectfully Submitted,

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